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No. 86-1068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LAWRENCE DUNCAN and MARGARET DUNCAN,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals of Georgia ruled that "[a]lthough the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. 'Like bank records, telephone and billing records are not owned or possessed by the Defendant, but are business records belonging to the telephone company.'" Appendix p. 19a. The questions presented are:

1. Whether standing exists, under either or both 18 U.S.C. §2518 and the Fourth Amendment of the United States Constitution, to contest the validity of a wiretap warrant due to its being tainted by the fruits of a prior illegal seizure not involving Petitioners' premises or property, which prior seizure was made in order to gather evidence to obtain a wiretap of Petitioners' home phone.

2. Whether the knowing and intentional use of bogus subpoenas in non-existent cases to obtain evidence in support of a wiretap warrant violates the precepts of fundamental fairness and decency as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution or, alternatively, whether standing may be conferred under the Fourth Amendment to the United States Constitution so as to remedy this intentional abuse.

3. Whether an unexplained failure by the State to return and seal tape recordings obtained via a wiretap, in violation of 18 U.S.C. §2518(8)(a), mandates suppression of the recordings and evidence obtained as a result thereof, when there are no allegations of alteration of the recordings.

4. Whether evidence seized as a result of the wiretap

should have been suppressed when no facts were set forth on the face of the supporting affidavit and application to establish the inadequacy of alternative procedures, when no facts were set forth to establish why a twenty-day wiretap was required, when no probable cause was set forth on the face of the affidavit and when the affidavit contained reckless and intentional non-truths, all in violation of 18 U.S.C. §2518 and the Fourth Amendment to the United States Constitution.

5. Whether evidence seized as a result of the search of Petitioners' automobile should have been suppressed when no facts were set forth on the face of the supporting affidavit to establish probable cause, when the failure to set forth probable cause was of such a nature that any reasonably well trained officer should have been aware of the failure and when the affidavit contained reckless and material nontruths, all in violation of the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners, Lawrence Duncan and Margaret Duncan;

Respondent, State of Georgia;

Co-defendants in proceedings below, Delvin Richard Van Nice, David Wayne Van Nice and Pamela Jean Long.

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWING THE WRIT 6

CONCLUSION 25

APPENDIX A
Order of the Supreme Court of Georgia denying rehearing (October 28, 1986) 1a

APPENDIX B
Order of the Supreme Court of Georgia denying certiorari (October 9, 1986) 2a

APPENDIX C
Opinion of the Court of Appeals of Georgia (July 16, 1986) 3a

APPENDIX D
Order of the Court of Appeals of Georgia denying rehearing with revision of opinion (July 31, 1986) 18a

APPENDIX E
Order of the Court of Appeals of Georgia granting interlocutory appeal (October 29, 1985) 28a

APPENDIX F
Order of the Superior Court of Chatham County denying motions to suppress (September 13, 1985) 29a

Page

APPENDIX G
Statutes and Constitutional Provisions Involved (Rule 21.1(f)) 31a

APPENDIX H
Reference to Federal Questions Raised and Rulings (Rule 21.1(h)) 41a

APPENDIX I
Wiretap Warrant (March 10, 1983) 44a

APPENDIX J
Application for wiretap warrant (March 10, 1983) 51a

APPENDIX K
Affidavit in support of wiretap warrant and application (March 10, 1983) 59a

APPENDIX L
Search warrant and affidavit for search of Petitioners' Lincoln automobile (March 27, 1983) 78a

TABLE OF AUTHORITIES

Cases: Page

Berger v. New York,
388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed.2d 1040 (1967) 18, 20

Commonwealth v. DeJohn,
403 A.2d 1283 (1979) 12

Commonwealth v. Sell,
470 A.2d 457 (1983) 12

Dalia v. United States,
441 U.S. 238, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979) 18

DeMartina v. Weidenburner,
616 F.2d 708 (3rd Cir. 1980) 15

Illinois v Gates,
462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1984) 21

In re DeMonte,
674 F.2d 1169 (7th Cir. 1977) 19

Kesler v. State,
249 Ga. 462 (1982) 7

Little v. State,
157 Ga. App. 462 (1981) 13

People v. Blair,
602 P.2d 738 (1979) 12

Rakas v. Illinois,
439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978) 9, 12

Rochin v. California,
342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952) 11

State v. Eder,
704 P.2d 465 (1985) 12

Page

State v. Sidebotham,
474 A.2d 1377 (1984) 12

United States v. Abascal,
564 F.2d 821 (9th Cir. 1977) 19

United States v. Civella,
648 F.2d 1167 (8th Cir. 1981) 9

United States v. Costello,
10 F. Supp. 1450 (D.C. Ill. 1985) 18

United States v. Diadone,
558 F.2d 775 (5thCir. 1977) 15

United States v. Diana,
605 F.2d 1307 (4th Cir. 1979) 15

United States v. Falcone,
505 F.2d 478 (3rd Cir. 1974) 15

United States v. Fury,
554 F.2d 522 (2d Cir. 1977) 10

United States v. Gambale,
610 F. Supp. 1515 (D.C. Mass. 1985) 9

United States v. Gigante,
538 F.2d 502 (2nd Cir., 1976) 15

United States v. Giordano,
461 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) 8, 18

United States v. Johnson,
696 F.2d 115 (D.C. Cir. 1982) 15, 16

United States v. Kahn,
415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 255 (1974) 18

United States v. Lawson,
545 F.2d 557 (7th Cir. 1975) 15

Page

United States v. Leon,
468 U.S.897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984) 23, 24

United States v. Lilla,
699 F.2d 99 (2nd Cir. 1983) 19

United States v. McGrath,
622 F.2d 367 (2nd Cir. 1980) 15

United States v. Miller,
425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) 7

United States v. Payner,
447 U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980) 11, 12

United States v. Plotkin,
550 F.2d 693 (1st Cir. 1977) 10

United States v. Russell,
411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1974) 11

United States v. Scasino,
513 F.2d 478 (5th Cir. 1975) 9

United States v. Spagnuolo,
549 F.2d 705 (9th Cir. 1977) 19

United States v. Wac,
498 F.2d 1227 (6th Cir. 1974) 8

United States v. Williams,
580 F.2d 578 (D.C. Cir. 1978) 7, 8

United States v. Williams,
737 F.2d 594 (7th Cir. 1984) 10

United States v. Wright,
524 F.2d 1100 (2nd Cir. 1975) 8

Waring v. State,
670 P.2d 357 (1983) 12

Page

Wong Sun v. United States,
371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) 23

Constitutional Provisions:

U.S. Const., Amendment IV ..... i, ii, 7, 9, 10, 11, 12, 16, 18, 20

U.S. Const., Amendment V ..... i, 11

U.S. Const., Amendment XIV ..... i, 11, 12

Statutes:

18 U.S.C. §2510 ..... 7, 9, 15

18 U.S.C. §2518 ..... i, ii, 7, 10, 13, 14, 16, 17, 18, 20, 21

Official Code of Georgia (O.C.G.A.) §16-10-20 11

Other Authorities:

1 ABA, *Standards for Criminal Justice, The Prosecution Function*, 3-3.1(d) (2d Ed. 1980) 10-11

Advisory Opinion No. 40, State Bar of Georgia, September 1984 11

Carr, *The Law of Electronic Surveillance*, §4.05(3)(a) (Clark-Boardman Publ.) 17

Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 U.S.C. §2518(8)(a) as Ground For Suppression, 62 ALR Fed 636 14

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STATE OF GEORGIA,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 180 Ga. App. 112 and is reprinted in the Appendix hereto, p. 3a, with revisions at p. 18a. Rehearing was denied by the Court of Appeals of Georgia, said denial being reprinted in the Appendix hereto, p. 18a. Certiorari to the Supreme Court of Georgia was denied, and rehearing by that Court was also denied, with three of seven justices dissenting, both of which denials were without official report, same being reprinted in the Appendix hereto, pp. 2a and 1a, respectively.

JURISDICTION

The Superior Court of Chatham County, Georgia, denied Petitioners' motion to suppress by Order dated September 13, 1985, and subsequently, certified that Order as being of such importance that an interlocutory appeal should be granted. The Court of Appeals of Georgia accepted the interlocutory appeal and on July 16, 1986, affirmed the trial court's order, rehearing being denied on July 31, 1986. On October 9, 1986, the Supreme Court of Georgia denied Petitioners' Application for Writ of Certiorari, and on October 28, 1986, rehearing was denied with three of seven justices dissenting. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The within case arose by virtue of a wiretap initiated on March 10, 1983, in Dade County, Georgia, for the home telephone of Petitioners. (Appendix, p. 44a). The Duncans are an older couple, Mr. Duncan being 68 years of age.

It was undisputed that Georgia Bureau of Investigation Officer Brad Bonnell knowingly and intentionally used bogus subpoenas issued in non-existent cases and that information gained from the subpoenas led directly to the issuance of the warrant for the wiretapping of the Duncans' home telephone and eventually to the seizure of alleged contraband and the arrest of Petitioners. Specifically, Agent Bonnell, through use of the "subpoenas," procured telephone toll records of Mr. and Mrs. Duncan from the Trenton, Georgia, telephone company and also procured treatment records of Mr. Duncan from a Tennessee hospital.

The subpoenas in question recited that the records requested should be produced in court on a day certain, and in lieu of a court appearance, the records could be turned over to G.B.I. agent Bonnell. The subpoenas also recited that Petitioners should not be informed of the release of the information. Bonnell admitted that he did not inform the issuing clerk that no case was pending (Sept. Tran. p. 117), that he did not make returns of the subpoenas (Sept. Tran. p. 102), and that he served one of the subpoenas in Tennessee although he knew he had no legal authority to do so. (Sep. Tran. p. 128, 157-158).

The affidavit for the warrant itself contained numerous nontruths and stale information. (See Appendix p. 59a). Due to length limitations, Petitioners will herein set forth only some of the more egregious inaccuracies, reserving the right to set forth the additional inaccuracies in their brief upon certiorari being granted. Petitioners would submit, however, that the vast majority of the affidavit is either untrue or deals with individuals other than the Petitioners.

It is undisputed that two persons identified in the application for the wiretap as being actively involved in criminal enterprises with Mr. Duncan, same being Willie Waldie and Fred Gomez, had in fact been dead for several years prior to the date of the application. (Aug. Tran. pp. 462-464). In fact, these individuals were named in the warrant as being individuals whose phone conversations were to be monitored in that their criminal conversations were of a "continuing nature." (Appendix p. 47a).

Further, the affidavit recited that telephone toll records revealed a number of calls from the Duncan residence to the residence of Garland E. Smith in Tennessee. Mr. Smith was identified in the affidavit as a "major drug trafficking violator." (Appendix, p. 71a). Left undisclosed in the affidavit, however, was the fact that Garland Smith is the Duncans' son-in-law and the frequent calls were beween the Duncans and their daughter's home. (Nov. Tran., pp. 6-7). Mr. Smith testified at the suppression hearing, without rebuttal, that he has never been involved with drugs (Nov. Tran., p. 6), that he has never been arrested for any crime, that he is an honorably discharged veteran, that he is on the local school board in the area and that he is the Assistant Sunday School Superintendent at his church. Further, the evidence showed that Mr. Smith does not even use alcohol. (Nov. Tran., p. 12). All of this evidence was absolutely uncontradicted and Bonnell finally admitted tht the information as to Mr. Smith was not verified prior to its inclusion in the affidavit.

Further still, it was established that agent Bonnell failed to inform the issuing judge that none of the several arrests set forth on the face of the affidavit to establish the credibility of the informants had ever resulted in a conviction. One case was *nolle prossed* due to perjury by a law enforcement officer, and the others were either dismissed or terminated by acquittal.

Again, Agent Bonnell himself testified that he did not verify a number of items of information in the affidavit. Further, he admitted that the names of the two deceased individuals were included in the application as committing and as being about to commit violations of the controlled substances act merely because he had learned that Mr. Duncan had been arrested (and later acquitted) with the two individuals on a gun charge in 1974. He testified that

he included in the affidavit the names of every person ever allegedly engaged in criminal activities with Mr. Duncan regardless of how long ago the offenses were committed. (Sept. Tran., pp. 190-191, 442-444).

Bonnell thus opined that not only were these individuals still presently engaged in criminal activities with Mr. Duncan, but further, that they were engaged in narcotics violations. In short, the affidavit was replete with misstatements, innuendo and half-truths being intentionally calculated to lead the issuing judge to an incorrect conclusion as to probable cause.

It was also undisputed that during the recording of the conversations, the officers used a recording device in addition to the reel-to-reel device authorized by the issuing judge. The additional device was a manually operated cassette recorder. (Sep. 25-28, Tran., pp. 204-207). During monitoring, virtually all "suspect" calls were recorded on the cassette recorder. (Tran., pp. 559-574). The cassettes were admittedly treated as "working tapes" and were not treated as "evidence" and were not preserved with the same eye toward security as were the "official" reel-to-reel tapes. (Tran., pp. 217-218, 256, 559). It is undisputed that the cassette tapes were not sealed at the termination of the surveillance, were not returned to the issuing judge and the issuing judge was never made aware of their existence. (Sept. 25-28, Tran., p. 313).

The wiretap warrant authorized an interception for twenty days, the maximum period allowed by Georgia law. The District Attorney and Agent Bonnell testified that a wiretap of twenty days was sought because that is "what they normally do" (Aug. Tran., pp. 478-479) and because that was the longest period available. (Sept. Tran., p. 210). In this regard, they testified that had the law provided for a

forty-day wiretap then that period would have been sought. (Sept. Tran., p. 450). It was also undisputed that the wiretap was left in effect and calls were recorded from Petitioners' home phone even after the arrests of Petitioners.

In the course of the interceptions, police officers learned that Mr. Duncan planned a trip from his home in Trenton, Georgia, to Savannah, Georgia, on March 26, 1983. Pursuant to that information, the G.B.I. and the F.B.I. followed Mr. and Mrs. Duncan from Trenton to Savannah. In Savannah, the officers observed Mr. Duncan converse with other individuals occupying a green Cadillac. The next day, the Duncans drove to a K-Mart store where they parked near the green Cadillac. Mr. Duncan left the store with a co-defendant, Delvin Van Nice, and Van Nice drove Mr. Duncan, in the Cadillac, to a private residence. After Duncan and Van Nice entered the residence, Van Nice returned to the Cadillac where he was observed with a small brown box. An officer testified that it appeared that Van Nice took the box and reentered the home. Duncan and Van Nice then left the residence, returning to the K-Mart store. As Mr. and Mrs. Duncan were leaving the store and returning to their Lincoln automobile, they were arrested. A warrant later obtained for the search of both automobiles yielded diazepam in the trunk of the Cadillac and money and a weapon in the Lincoln.

Because review of the judgment of a state court is sought, the particulars required by Supreme Court Rule 21(h) are included in the Appendix, p. 41a.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The Court of Appeals of Georgia ruled that "[a]lthough the Duncans have general standing to attack the legality of

the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. 'Like bank records, telephone toll and billing records are not owned or possessed by the Defendant, but are business records belonging to the telephone company . . . .' Thus, defendants lack standing under the federal constitution to challenge the procedure by which the telephone records were obtained, and the warrant to tap which was subsequently issued." Appendix, pp. 19a-20a.

In so holding the Court cited *Kesler v. State,* 249 Ga. 462 (1982), which was based upon this Court's decision in *United States v. Miller,* 425 U.S. 435, 96 S. Ct. 1619, 48 L.Ed.2d 71 (1976). In *Miller, supra,* this Court held that a bank customer has no reasonable expectation of privacy in his bank records so as to make them protectable under the Fourth Amendment and thus possesses no standing to challenge a subpoena to the bank requiring their production.

Regardless of whether Petitioners would have standing to contest the seizure of the phone toll records, Petitioners contend that the Court of Appeals of Georgia erred in ruling that Petitioners did not possess standing to contest the wiretap on the basis of the initial underlying illegal seizure of the phone toll records.

At 18 U.S.C. §2510(11) it is provided that a person "aggrieved" by a wiretap is any party to an intercepted conversation or against whom an interception is directed. In 18 U.S.C. §2518(10)(a)(i) it is provided that any aggrieved individual may move to suppress a communication on the ground that same was "unlawfully intercepted." This statutory provision has been said to parallel in scope the standing provisions of the Fourth Amendment. *United States v. Williams,* 580 F.2d 578, n. 19 (1978). However, the inquiry as to when an accused may properly move to

suppress evidence seized as the result of a wiretap on the basis of a prior illegal seizure, when the accused would not have possessed standing to contest the prior seizure, is not easily answered under existing federal law.

In *United States v. Wac,* 498 F.2d 1227 (6th Cir. 1974), it was stated that when facts obtained pursuant to an initial illegal act are "essential in law or in fact" to the issuance of a subsequent wiretap, the subsequent wiretap is fatally tainted by the prior illegality. Although in *Wac, supra,* the issue of standing was not specifically addressed, that issue was addressed in *United States v. Wright,* 524 F.2d 1100 (2nd Cir. 1975). In that case the Court discussed the *Wac* decision in the context of standing.

The Court in *Wright, supra,* held that although the accused therein had standing to contest a subsequent wiretap he was without standing to contest a prior wiretap, the evidence from which was used, in part, to obtain the second wiretap. The Court, however, was careful to distinguish *Wac, supra,* noting that in that case, as distinguished from the situation in *Wright, supra,* the information from the first illegal act was "essential to the granting" of the subsequent wiretap. Thus, by direct implication, the Court in *Wright, supra,* ruled that one may attack a second search due to the illegality of a prior search, regardless of standing to contest the prior search, if evidence from the prior search was essential in law or fact to the second search, c.f., *United States v. Giordano,* 416 U.S. 505, 529-33, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

Similarly, other circuit courts have held that a subsequent search may be attacked on the basis of a prior tainted search if the prior illegal search was directed toward an investigation of the defendant which resulted in the second search. In *United States v. Williams,* 580 F.2d 578, 583

(D.C. Cir. 1978), for example, the Court indicated that standing may be conferred to attack a second wiretap due to the illegality of a prior wiretap if the prior wiretap was conducted on the accused's premises, involved a seizure of his conversations, *or* was directed toward that accused. This rule has continued to be followed in wiretap cases even after the decision in *Rakas v. Illinois,* 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978), in which the Court rejected the "target" theory of standing under the Fourth Amendment. The Courts in these Circuits appear to rely upon the language of 18 U.S.C. §2510(11) specificially defining an aggrieved individual as being one against whom the wiretap is directed. *United States v. Civella,* 648 F.2d 1167 (8th Cir. 1981); *United States v. Gambale,* 610 F. Supp. 1515 (D.C. Mass. 1985).

In the present case, even though the phone toll records may technically constitute the property of the phone company, certainly the seizure of these records, relating exclusively to the Duncan phone, was directed at the Duncans and not the phone company. As such, under the rule in *United States v. Williams, supra,* and the above cited decisions, the Duncans could properly move to suppress the wiretap on the basis of the illegality of the prior seizure of the phone toll records. See also in this regard, *United States v. Scasino,* 513 F.2d 47, 49 (5th Cir. 1975).

Other Circuits, however, have ignored the niceties of the above rules and opted for sweeping language to the effect that standing must necessarily be established on an independent basis as to both the first and second searches in order to attack the underlying validity of the initial seizure. This would apparently hold true regardless of whether the information seized in the first search was essential in law or in fact to the second search and without apparent

regard as to whom the initial search was directed. See, *United States v. Fury,* 554 F.2d 522 (2d Cir. 1977); *United States v. Williams,* 737 F.2d 594, 616 (7th Cir. 1984); *United States v. Plotkin,* 550 F.2d 693, 695 (1st Cir. 1977).

From the above, it is clear that a ruling is necessary from this Court to determine when standing may be conferred, under either or both U.S.C. §2518(10)(a)(i) and the Fourth Amendment, to contest the validity of a wiretap due to its being tainted by the fruits of a prior illegal search. Is standing conferred upon an accused merely because he is the individual against whom the wiretap was directed, even though the initial search did not involve his property or premises? Is standing conferred if evidence derived from the initial search is "essential in law or fact" to the validity of the second search? Is standing conferred to contest the second search due to illegality of the first search only when there would be independent grounds for standing under the Fourth Amendment to contest both searches? Is each search viewed in a vacuum or may the cumulative effect of both searches be considered when determining standing?

In the case at hand, a determination of the above questions is crucial in determining whether the Court of Appeals of Georgia erred in its ruling in this case and is essential in resolving the conflict between the Circuits as to the appropriate standard to be utilized.

QUESTION TWO

It was recognized by the Court of Appeals of Georgia, and was undisputed before the trial court, that the conduct of the G.B.I. agent in this case in using the bogus subpoenas was illegal. Appendix, p. 25a. See, 1 ABA, *Standards*

for Criminal Justice, The Prosecution Function, 3-3.1(d) (2d Ed. 1980) and Advisory Opinion No. 40, State Bar of Georgia, September 1984, which latter opinion concludes that use of such subpoenas constitutes a fraud on all parties concerned. See also, O.C.G.A. §16-10-20, arguably making such conduct a felony.

It was undisputed that this illegal act was committed by the agent intentionally, on advice from an Assistant District Attorney, and with knowledge of its illegality. Thus, the question is whether the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution mandates that the evidence seized by use of the subpoenas be excluded from evidence, or alternatively, whether standing under the Fourth Amendment should be conferred in order to remedy knowing and intentional violations of the Fourth Amendment.

In *United States v. Russell,* 411 U.S. 423, 431-432, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1974), this Court stated that, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Further, such an intentional violation of the law by an individual sworn to uphold the law certainly offends the precepts of fundamental decency and fairness. See, *Rochin v. California,* 342 U.S. 165, 169, 96 L.Ed. 183, 72 S.Ct. 205 (1952); but see, *United States v. Payner,* 447 U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980), note 9, which indicates that the Due Process Clause comes into play only when the government activity in question violates a protected right of the defendant as opposed to the rights of another.

In the present case, where the subpoenas were directed exclusively toward phone toll records of the Petitioners' home telephone, undisputedly in an effort to obtain a wiretap warrant for that telephone, one can scarcely conceive of whose rights would be violated if not those of the Petitioners, the very individuals sought to be investigated. Constitutional liberties, paid for in the blood of our forefathers, should not depend solely upon "arcane distinctions" developed in the law of personal property. *Rakas v. Illinois, supra,* at p. 43, 58 L.Ed.2d 387, 99 S.Ct. 421. As such, the issuance of the subpoenas must be viewed in the context of the overall search which was admittedly orchestrated to eventually lead to a wiretap on Petitioners' home phone.

Further, numerous state appellate courts have interpreted their respective state constitutions so as to confer standing in the face of intentional police misconduct. See in this regard, *Commonwealth v. DeJohn,* 403 A.2d 1283 (1979); *Commonwealth v. Sell,* 470 A.2d 457, 467 (Pa. 1983); *State v. Sidebotham,* 474 A.2d 1377 (N.H. 1984); *Waring v. State,* 670 P.2d 3578 (AK. 1983); *People v. Blair,* 602 P.2d 738 (CA 1979); *State v. Eder,* 704 P.2d 465 (N.M. 1985). All of these courts have recognized the distinction between a good faith blunder by the constable and the constable who himself intentionally commits a criminal act in order to apprehend those whose acts differ, not in kind, but only degree.

Because as noted in footnote nine of the decision in *United States v. Payner, supra,* p. 737, 65 L.Ed.2d 468, 100 S.Ct. 2439, this Court has never specifically addressed the important issue of whether the Due Process Clause of the Fourteenth Amendment or the Fourth Amendment would confer a remedy upon those aggrieved by intentional police misconduct, certiorari should be granted.

Certainly such a determination is crucial to the Petitioners in this case.

QUESTION THREE

The Court of Appeals of Georgia ruled that 18 U.S.C. §2518(8)(a) was not violated when law enforcement officers made duplicate tapes and thereupon failed to deliver same to the issuing judge and failed to have same sealed. The Court ruled that " '[t]he reel-to-reel original tapes were kept and returned to court and there is no requirement [state or federal] that the duplicate recordings be sealed or kept nor is their destruction prohibited when they have served their purpose.' [*Little v. State,* 157 Ga. App. 462, 465 (1981).] Accordingly, we find no state or federal violation here." Appendix, at p. 23a.

Again, it was undisputed that during the monitoring virtually all "suspect calls" were recorded on the cassette recorder. (Tran., pp. 559, 574). Cassettes thus obtained were treated as "working tapes" and were available to the officers conducting the surveillance. As such, their whereabouts could not be verified by Agent Bonnell during the course of the wiretap. It was also undisputed that the cassette tapes were not sealed and were not delivered to the issuing judge at the end of the surveillance. In fact, the issuing judge was not even aware of the use of the cassette recorder or of the cassette tapes.

At 18 U.S.C. §2518(8)(a) it is provided as follows: "The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed

under his direction. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years."

In the present case the officers conducting the electronic surveillance chose to ignore the mandates of 18 U.S.C. §2518(8)(a) as set forth above. Similarly, the Georgia Court of Appeals chose to focus exclusively upon 18 U.S.C. §2518(8)(a) which allows duplicate tapes to be made, ignoring the parallel language in the statute requiring that whatever tapes are made shall be delivered to the judge and sealed under judicial supervision.[1]

In addition to the fact that the Court of Appeals failed to address the requirements of the federal statute, certiorari should be granted due to the fact that the federal Circuits are in disarray as to the proper test to determine when the failure to seal wiretap tapes will require suppression. See, *Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 USC §2518(8)(a) as a Ground for Suppression,* 62 ALR Fed 636.

One view is that suppression is required unless the government presents a satisfactory explanation for the delay, even though the integrity of the recording is unchallenged. This view is based upon the premise that substantial noncompliance with central or functional safeguards in the statutory scheme to prevent governmental abuse should result in suppression. This view focuses upon the fact that

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[1]Obviously, the District Attorney who drafted the wiretap documents in this case felt that judicial authority was required for the making of duplicate tapes. Specifically, an Order was drafted at the termination of the wiretap solely for the purpose of allowing subsequent duplication of the reel-to-reel tapes. The cassette tapes here complained of were made during the period of the interception and prior to the entry of the order to allow subsequent duplication.

electronic wiretapping is unlawful except upon careful compliance with the terms of 18 U.S.C. §2510, *et seq.* This view also takes into consideration the fact that the Congressional goal in enacting the statute was not only to ensure integrity of the tapes themselves, but also, to ensure that the procedure is overseen and monitored by a detached judicial officer as opposed to the officers engaged in the hot pursuit of evidence.

Under this view, one factor to be considered in determining whether suppression will be required is if the procedures set forth in the statute have been deliberately ignored. In this regard see, *United States v. Johnson,* 696 F.2d 115 (D.C. Cir. 1982); *United States v. Gigante,* 538 F.2d 502, 507 (2d Cir. 1976); *United States v. McGrath,* 622 F.2d 36 (2d Cir. 1980).

In the Third, Fourth, Fifth and Sixth Circuits, however, a rule has emerged where an unexplained delay in failing to seal tapes does not require suppression unless the accused presents evidence of actual tampering with the tapes. *United States v. Diadone,* 558 F.2d 775, 780 (5th Cir. 1977); *United States v. Lawson,* 545 F.2d 557, 564 (7th Cir. 1975); *United States v. Falcone,* 505 F.2d 478, 483-84 (3d Cir. 1974);[2] *United States v. Diana,* 605 F.2d 1307, 1312-16 (4th Cir. 1979). In these Circuits, prevention of tampering with the evidence is seen as the primary objective of the statute and apparently actual tampering would have to be shown in order to require suppression regardless of how egregious the violation of the statute.

This Court should utilize the within case as an opportunity to set forth a uniform test as to when a failure to seal tapes will result in suppression.

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[2]But see, *DeMartina v. Weidenburner*, 616 F.2d 708 (3d Cir. 1980).

As recognized by the Court in *United States v. Johnson, supra,* at p. 124, to demand that the accused present evidence of actual tampering "would vitiate the congressional purpose in requiring judicial supervision of the sealing process." Obviously, the authority to wiretap is a valuable investigative tool. Wisely, however, the Congress also recognized that the investigative wiretap is a tool which is subject to great abuse if left to the unfettered discretion of the officer in the field. Such unfettered and unchecked use of duplicate tapes is a potential mischief which the law has undertaken to remedy by virtue of direct judicial supervision. The whole scheme of the statute is a balanced approach, allowing the government to obtain hard to get evidence where probable cause exists, while still protecting the citizen's right to privacy in all other matters. The unchecked and unfettered use and availability of what the officers themselves may choose to call "working tapes," upsets this delicate balance and effectively negates the detailed statutory scheme. Because in the within case the reel-to-reel recordings were sealed but the duplicate cassette tapes were neither sealed nor accounted for, the question of whether this delicate statutory balance is the critical factor or whether actual prejudice to the accused is the critical factor in determining when suppression will result is clearly presented for determination. As such, certiorari should be granted.

QUESTION FOUR

Probable cause was not set forth on the face of the affidavit or in the application for the search warrant as required by 18 U.S.C. §2518(1)(b) and (3) and by the Fourth Amendment to the United States Constitution. The majority of the contents of same relate to individuals other than

Lawrence Duncan and relate to events transpiring long before the affidavit was prepared.

In a nutshell, Agent Bonnell established that Mr. Duncan had in the past known and associated with various individuals reputed to be criminals. Bonnell sought to establish that these persons had telephoned the Duncan residence, that Mr. Duncan had telephoned them, and thus Mr. Duncan must be "up to something."

Bonnell encapsulated the thrust of the affidavit in the second full paragraph of page 13 of same (Appendix, p. 73a), to the effect that, "[f]rom the information concerning the telephone numbers of documented drug violators and the analysis of the telephone toll records for the instrument located in the [Duncan] residence . . . combined with the frequency and persons contacted . . . indicates that this particular phone is being utilized by Lawrence R. Duncan to further his criminal endeavors in the area of illegal drug trafficking." In short, Bonnell sought to obtain the warrant as a strategic intelligence gathering tool, which is exactly what the federal wiretap statute was designed to prevent. Strategic intelligence gathering is, of course, working from known criminals to unknown crimes, otherwise known as a "fishing expedition." See, Carr, *The Law of Electronic Surveillance,* §4.05(3)(a) (Clark-Boardman Publ.).

At 18 U.S.C. §2518(1)(b)(iii), it is required that the applicant set forth with particularity the type of communication to be intercepted. 18 U.S.C. §§2518(1)(b)(ii) and (iv) require a showing of probable cause that the phone in question is being used to further one of the crimes specified in the statute, as opposed to criminal activity in general.

The only specification in the application at hand as to the conversations which would be intercepted were "all

discussions and conversations" of Lawrence Duncan and several other persons therein listed. [Appendix J, at p. 56a]. Again, two of the individuals were later determined to have been dead for several years prior to the application. Certainly this falls far short of any particularization of the "thing" to be seized as required by the Fourth Amendment.

The application also failed to contain any facts whatsoever to establish the inadequacy of alternative investigative procedures as required by 18 U.S.C. §2518(1)(c) and (3)(c). Facts, as opposed to boiler plate conclusions, are also required by the terms of the Fourth Amendment to the United States Constitution so that all parties concerned will know what is to be seized and in order to avoid the Fourth Amendment's prohibition against general warrants. See, *Berger v. New York,* 388 U.S. 41, 60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). See also, an excellent discussion of the necessity rule in *United States v. Costello,* 610 F.Supp. 1450 (D.C. Ill. 1985).

In this respect, this Court has stated that wiretapping is "not to be routinely employed as the initial step in a criminal investigation," *United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and must not be resorted to in situations where traditional investigative techniques would suffice to expose the crime. *United States v. Kahn,* 415 U.S. 143, 153, fn. 12, 39 L.Ed.2d 225, 94 S.Ct. 977 (1974). See also *Dalia v. United States,* 441 U.S. 238, 250, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979).

Apart from the general admonitions set forth above, this Court has yet to address the question of what type of particularized showing is required to establish the necessity for a wiretap and to establish the inadequacy of alternative investigative procedures.

Lower federal courts, however, are generally in accord that a statement of facts must be set forth to establish the inadequacy or unavailability of alternative investigative procedures as opposed to conclusory boiler-plate allegations. Sufficient facts must be set forth in order to enable the judge to determine why, in that particular case, normal investigative procedures are insufficient or why, under the particular facts of that case, same would be too dangerous. *United States v. Lilla,* 699 F.2d 99 (2d Cir. 1983); *In re DeMonte,* 674 F.2d 1169, 1174 (7th Cir. 1977). It is not sufficient to merely characterize the case as a "drug conspiracy" or other type of case which is in general "tough to crack." *United States v. Abascal,* 564 F.2d 821, 826 (9th Cir. 1977); *United States v. Spagnuolo,* 549 F.2d 705, 710 (9th Cir. 1977). In this regard, the assertion by Agent Bonnell in the affidavit to the effect that from his "experience the only way to investigate fully" an illegal drug enterprise is through use of a wiretap is even more interesting when read in conjunction with his other testimony that this was his first wiretap case. (Sep. Tran., p. 209).

Again, in the case at hand, recitations in the affidavit and application as to the necessity for the wiretap were admittedly lifted verbatim from a prosecutorial handbook which agent Bonnell was using as a guide. (Supp. R., pp. 23, 312, 408). Further, the allegations in the affidavit to establish why in this case a wiretap was necessary were shown to be false. Specifically, allegations in the affidavit to the effect that the house was "fortified" were shown not to be true. District Attorney Lomineck, who made the application for the wiretap, testified that his only recollection as to what Bonnell told him regarding the necessity for the wiretap was that Bonnell could "not get close to" the Duncan house. (Aug. Tran., p. 458). This information was identified as having come from Sheriff Steele of Dade

County, Georgia. Sheriff Steele, however, testified that this "fortified" fence was in fact a decorative split-rail fence which does not block the house from view from the highway. (Nov. Tran., pp. 44, 60).

The application was also defective in that no particularized statement was made to show why the authorization should not terminate when the type communication sought was first obtained as required by 18 U.S.C. §2518(1)(d). In fact, it was repeatedly *admitted* that a twenty-day period was sought solely because that is the maximum time allowed under Georgia law and because that is the period of surveillance "usually" sought. (Aug. Tran., pp., 478-479; Sep. Tran., pp. 210, 450). This also runs afoul of the Fourth Amendment's prohibition against searches being extended for a period so long as to render the probable cause "stale." See, *Berger v. New York, supra.*

It was also undisputed that the wiretap was continued and calls were monitored to the Duncan phone for an entire day after the arrests of Mr. and Mrs. Duncan in Savannah in violation of 18 U.S.C. §2518(5), which requires termination of the wiretap upon attainment of the authorized objective and that same shall be executed as soon as practicable.

Finally, the material nontruths as set forth in the statement of the case establishes by a preponderance of the evidence that same were of such a nature as to have either been included intentionally or with a reckless disregard for the truth. In fact, the misrepresentations of fact were so widespread that the District Attorney who applied for the warrant, and Judge Paul Painter who executed same, testified that had they known of the extent of the nontruths in the affidavit they would not have signed the application and warrant. (Aug. Tran., pp. 116, 465-467). Further, the District Attorney testified that had he been informed of

certain of these nontruths, same would have affected his entire opinion as to Agent Bonnell's credibility. (Aug. Tran., pp. 472-473). Similarly, as to the reliability of the informants, no facts were set forth to establish the reliability of the informants as required by *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1984), except facts which were later proven to be untrue or calculated to lead the judge to an incorrect conclusion.

Certiorari should thus be granted in order for this Court to articulate what degree of particularization the affidavit and the application must contain regarding the necessity of the phone tap warrant. Certiorari should also be granted due to the fact that the wiretap was not terminated upon the officers' first obtaining the communication sought, in violation of 18 USC §2518(i)(d). Finally, certiorari should be granted due to the warrant issuing in this case upon reckless or intentional assertions in the affidavit and application for the wiretap warrant.

QUESTION FIVE

The affidavit for the search warrant of Petitioners' automobile failed to set forth facts to establish probable cause and said failure was such that any reasonably well trained officer would have known that no probable cause existed for the issuance of the warrant and the subsequent search of the automobile.

The affidavit for the search of Petitioners' Lincoln automobile is set forth at Appendix, p. 78a. The affidavit in support of the search warrant for the Lincoln purported to set forth the contents of an intercepted phone conversation wherein an unidentified male allegedly advised Mr. Duncan that his "order was prepared" and that Mr. Duncan should proceed to Savannah on March 26, 1983 to pick up the order. (Supp. R., p. 251).

The affidavit went on to recite that after arriving in Savannah, Duncan made contact with other individuals who were in a green Cadillac and Duncan was later seen meeting with a white male who took a package from the Lincoln into the unidentified male's residence. (Supp. R., p. 251). The affidavit further recited that on Sunday, March 27, 1983, Mr. Duncan was observed operating the green Cadillac and agents saw it return to the unidentified male's residence. A G.B.I. agent subsequently observed another young male transfer a package, about the size of a shoe box, from the residence to the Cadillac.

During the motion to suppress hearing, however, Bonnell testified that certain particulars in the affidavit for the search of the Lincoln were not true. Specifically, regarding the alleged phone call to Mr. Duncan, contrary to what is stated on the face of the affidavit, the term LSD was not used, but rather, Bonnell testified he was not positive what was said. The secretary who typed the transcript testified that the word actually spoken merely sounded like LSD. (Supp. R., pp. 165-166). Other than this inconclusory reference, no mention of any controlled substance was made in the conversation.

It was also indicated in the affidavit that Mr. Duncan traveled to the same residence in Savannah on both Saturday and Sunday. Again, it was recited that Duncan traveled in the Lincoln on Saturday and dropped off a package and then returned on Sunday in the Cadillac and picked up a package. (Supp. R., pp. 247, 251). The investigating officers, however, testified that Duncan traveled to a different address on each of the trips. (Supp. R., pp. 90, 94). It is undisputed that this fact was known to Bonnell, the supervising officer, at the time the search warrants were obtained. (Sept. Tran., pp. 523, 524).

Further still, and perhaps most importantly, the G.B.I. agent who allegedly saw the package coming out of the Cadillac testified that in fact he could not determine if the package was going into or coming out of the Cadillac. (Aug. 28-29 Tran., pp. 56-58, 68-69). In fact, Agent Bonnell testified that he believed it had gone from the automobile into the house, the opposite from the statement in the affidavit. (Sept. Tran., p. 246).

Even had all the statements on the face of the affidavit been true, there was absolutely no probable cause for the search of the Lincoln. The only mention of the Lincoln automobile whatsoever in the affidavit is the mention of the package coming *from* the Lincoln to the residence shortly after Mr. Duncan arrived in Savannah. Nowhere was it stated that anything was ever seen going into the Lincoln. Again, the alleged phone conversation which led the officers to follow Duncan to Savannah stated that Duncan was to "pick up his order." (Supp. R., p. 251). Nothing was set forth to show that any such "order" was placed into the Lincoln.

Probable cause amounts to more than mere suspicion. *Wong Sun v. United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In the present case, the warrant may have set forth facts to raise a mere suspicion that Duncan planned to "pick up a delivery." However, the facts do not establish that the Lincoln was to be used in any such connection or that anything was ever placed into the Lincoln after its arrival in Savannah. In this regard, it is interesting to note that upon search of the Lincoln no drugs or controlled substances were found in the Lincoln, the search yielding only a sum of money and a gun.

Further, *United States v. Leon,* 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984), does not require a dif-

ferent conclusion. This Court in *Leon, supra,* noted that the good faith rule set forth therein has several important exceptions. Specifically, a magistrate's finding of probable cause would not preclude inquiry into the knowing or reckless falsity of the affidavit upon which the determination of probable cause was based. Suppression, therefore, remains an appropriate remedy if the magistrate in issuing the warrant was misled by information in an affidavit that the affiant knew or should have known was false. Further, the good faith rule does not apply in cases where the issuing magistrate wholly abandons his judicial role such that no reasonably well trained officer could rely on the warrant. Finally, it was stated that a warrant may be so facially deficient that the officers executing it could not reasonably presume it to be valid.

Because in the present case the affidavit for the search of the Lincoln automobile was replete with admitted inaccuracies, and because the warrant was so facially defective that Agent Bonnell should have known that the warrants were in fact invalid, the rule in *United States v. Leon, supra,* is inapplicable to the case at hand. As such, the sum of money and the hand gun taken from the Lincoln should have been suppressed from evidence.

CONCLUSION

For the foregoing reasons, Petitioners request that a writ of certiorari be issued to review the judgment of the Court of Appeals of Georgia in this case.

Respectfully submitted,

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December 28, 1986

APPENDIX "A"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 10/28/86

The motion for a rehearing was denied today:

Case No. 43836, Duncan et al. v. The State

Smith, Weltner & Bell, J.J., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 10/9/86

Case No. 43836. Duncan et al. v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J., who dissents.

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX "C"

72189. VAN NICE et al. v. THE STATE.
72190. DUNCAN et al. v. THE STATE. (Bea-67/68)

BEASLEY, Judge.

In this interlocutory appeal defendants Mr. and Mrs. Duncan, Long, and brothers Delvin and David Van Nice challenge the denial of their motion to suppress wiretap evidence and motion to suppress other evidence alleged to have been seized illegally.

All defendants were charged with possession of marijuana and possession of a controlled substance, diazepam, found in an auto search. Mr. Duncan and Delvin Van Nice were also charged as recidivists. Mrs. Duncan faces additional charges relating to pills and a pistol found in her purse upon arrest: posession of controlled substances methaqualone, benzaphetamine, and temazepam; — possession of dangerous drugs doxipin and diphenhydramine; carrying a pistol without a permit; carrying a concealed weapon.

Suspecting Mr. Duncan of drug trafficking activities, the Georgia Bureau of Investigation obtained from the Georgia telephone company telephone toll records of the Duncans' home phone by securing subpoenas for the production of documentary evidence although there were no related hearings, cases or grand jury investigations pending before the issuing court. The subpoenas stated: "In lieu of an appearance in Court said records may be turned over to GBI Special Agent Brad Bonnell. As this investigation is still ongoing, it is requested that said subscribers not be informed about these records." The GBI also obtained Mr. Duncan's medical records regarding his hospitalization for a gunshot wound by subpoenaing them from a

Tennessee hospital, although no related cases were pending.

The information gained from the subpoena led to the issuance of a warrant for the wiretapping of the Duncans' home telephone. Agent Bonnell's affidavit in support of the warrant recited in part, "from the information concerning the telephone numbers of documented drug violators and the analysis of the telphone toll records for the instrument located in the residence occupied by Lawrence Duncan combined with the frequency and persons contacted . . . indicates that this particular phone is being utilized by Lawrence R. Duncan to further his criminal endeavors in the area of illegal drug trafficking. . ." The affidavit also contained names of those suspected of criminal involvement with Duncan, including the names of two men who had died several years prior to the date of the affidavit.

The wiretap produced a conversation between Mr. Duncan and a man who identified himself as Raoul in which Raoul advised Duncan to go to Savannah on a specified date to pick up his "order," thought to be drugs. Investigators followed Duncan and his wife to Savannah where they observed the following contact with co-defendants Delvin and David Van Nice and Long: Mr. Duncan spoke to persons traveling in a green Cadillac owned by Long. Later the Duncans drove to a K-Mart store in their blue Lincoln where they parked near the green Cadillac. Mr. Duncan left the store with Delvin Van Nice, and Van Nice drove him in the Cadillac to a private residence. Van Nice entered the residence and returned to the Cadillac, where he had in his possession a small box. He then reentered the home. Duncan and Van Nice left the residence and went back to the K-Mart where the other defendants had remained. When defendants were returning to their respective cars, the Duncans to the Lincoln, and Long and Del-

vin and David Van Nice to the Cadillac, all were arrested. A pistol and pills were found in Mrs. Duncan's purse. A warrant obtained for the search of the cars uncovered marijuana and diazepam in the Cadillac's trunk, money in the Lincoln's trunk, and a weapon in the glove compartment.

72189.

The appeal of defendants Delvin and David Van Nice and Long.

1. The Van Nices and Long assert that all evidence seized as a result of the wiretap must be suppressed since the wiretap was illegally issued based upon information gained through sham subpoenas and material misrepresentation by affiant.

They fail to specify whether they are asserting state or federal constitutional and/or state statutory claims. However, a review of the arguments on the motion to suppress and the cases cited on appeal reflect defendants are raising a federal Fourth Amendment argument as well as a state statutory (OCGA § 17-5-30) argument. See *State v. Comp,* 175 Ga. App. 591, 592-594(1) (333 SE2d 896) (1985).

These defendants lack standing to challenge the legality of the wiretap. " '. . . Fourth Amendment rights are personal rights which, like some other constitutional rights may not be vicariously asserted.' *Alderman v. United States,* 394 U.S. 165, 174 (89 SC 961, 22 LE2d 176) . . . 'Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose. But for [federal] constitutional purposes, . . . any petitioner would be entitled to the suppression of government evidence originating in electronic surveillance violative of his own

Fourth Amendment right to be free of unreasonable searches and seizures. Such violation would occur [only] if [the state] unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises . . .' [Cit.] ". . . The only [Georgia] authority for a motion to suppress is Ga. Code § 27-313 [OCGA § 17-5-30], and under the provisions of that statute a pretrial motion to suppress is available only to the person aggrieved by an unlawful search and seizure. [Cit.]." *Romano v. State,* 162 Ga. 816, 819(1) (292 SE2d 533) (1982). To be "aggrieved" under Georgia law, the violation must have occurred on the movants' premises or the unlawfully heard conversation must have been of the movants themselves in order to suppress the evidence. Id. Neither is the case here.

2. Challenging the admission of the marijuana and diazepam seized from the trunk of the Cadillac, defendants enumerate lack of probable cause to issue the search warrant. Once again it is unclear whether they raise a federal or state constitutional argument. A review of the argument below, however, reflects defendants base their enumeration upon the federal constitution. See *State v. Camp,* supra.

The affidavit in support of the warrant discussed the phone conversation in which Mr. Duncan was instructed to go to Savannah to pick up his order, the following of Duncan to Savannah, investigators' observation of various contacts and interactions between Duncan and the Van Nices, and the use of the Cadillac by Mr. Duncan and Delvin Van Nice to go to the private residence. Included also was information that a GBI agent had observed a package transferred from the private residence to the Cadillac where it was placed in the vehicle "in such a way as to indicate that it was being concealed." Noted, too, was that

suspected marijuana was observed on the car's front seat in plain view as were cigarette rolling papers, an "item[s] of paraphernalia utilized in the consumption of controlled substances."

Even assuming that both Van Nices and Long have standing to contest the auto search, their enumeration fails. " 'A grudging or negative attitude by reviewing courts toward warrants' . . . is inconsistent with the Fourth Amendment . . . [S]o long as the magistrate had a 'substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois v. Gates,* 463 U.S. 1237 (103 SC 2317, 76 LE2d 527, 547) (1983). ". . . [R]eviewing courts . . . should apply a deferential standard of review in order to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Fultz,* 171 Ga. App. 886, 888 (321 SE2d 381) (1984). The affidavit in support of the warrant provided a substantial basis for concluding the auto contained evidence of wrongdoing. Accordingly, probable cause being sufficient, the trial court did not err in denying defendants' motion to suppress on this ground.

The fact that the affidavit recited that a GBI agent had observed the package transferred from the residence to the auto, where the agent's later statement was equivocal as to whether the transfer was from the house to the auto or vice versa, or whether the box originated and was left in the auto, is not fatal to the warrant. "Minor factual inaccuracies which are only peripherally relevant to the showing will not void the warrant where their presence in the affidavit is not such as to reflect on the credibility of the affiant." *Dresch v. State,* 125 Ga. App. 110, 111-112 (4) 186 SE2d 496) (1971). See also *Rugendorf v. U.S.,* 376 U.S. 528, 532 (84 SC 825, 11 LE2d 887) (1964).

3. Defendants' enumeration that probable cause was lacking to issue arrest warrants is meritless, first because there was no arrest warrants [sic] issued, and second, even if probable cause was absent at the time of their warrantless arrests, this is irrelevant to the motion to suppress at issue. As discussed in Division 2 of this opinion, there was probable cause to search the auto and a warrant was obtained, resulting in the seizure of the contraband.

72190.

The appeal of Mr. and Mrs. Duncan

1. The Duncans contend that the wiretap was illegal "in that the same was obtained through use of illegal, sham subpoenas issued in non-existent cases," and therefore all evidence obtained as a result is inadmissible under the U.S. Constitution's Fourth and Fourteenth Amendments, state statutes OCGA § 17-5-30 and OCGA § 16-11-67 and GA. Const. 1983, Art. I, Sec. 1, Par. XIII (former Ga. Const. 1976, Art. I, Sec. I, Par. X).[1]

A) The telephone toll records. Although the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. "Like bank records, telephone toll and billing records are not owned or possessed by the defendant, but are business records belonging to the telephone company. *United States v. Baxter,* 492 F.2d 150, 167 (9th Cir. 1973). *Katz v. United States,* 389 U.S. 347 (88 S.Ct. 507, 19 LED2d 576) (1967), urged by the defendants, recognizes the right of privacy in the contents of the telephone

[1]The Georgia Constitution is not argued so is not addressed.

conversation, not in the toll and billing records of the telephone company. Thus, neither defendant . . . ha[s] standing to object to the production of these records by the telephone company . . . It follows that the trial court did not err in refusing to suppress them or in admitting them into evidence at the trial." *Kesler v. State,* 249 Ga. 462, 469-470(5) (291 SE2d 497) (1982). Thus, defendants lack standing under the federal constitution to challenge the procedure by which the telephone records were obtained, and the warrant to tap which was subsequently issued.

Nor do defendants have standing under state statute OCGA § 17-5-30 to make such argument since they were not "aggrieved" by the seizure of the toll records because the records belong to the phone company. *Romano,* supra; *Kelser,* supra.

Sacchinelli v. State, 161 Ga. App. 763, 764 (288 SE2d 894) (1982), cited by defendants, which also involved sham subpoenas and a wiretap issued as a result of information gained, is inapposite to the case at bar because it involved the seizure of telephone conversation in which defendant had a privacy interest, not telephone toll records.

Defendants' argument that OCGA § 16-11-67 provides them with the relief they are seeking has been rejected in *Kesler,* supra, the court concluding that Code Ann. §§ 26-3001, 26-3007 [OCGA §§ 16-11-62, 16-11-67], while applicable to the content of telephone conversations, do not extend to include telephone company records.

As stated in *Romano,* supra at 819, "[t]he *only* [Georgia] authority for a motion to suppress is Ga. Code § 27-313 [OCGA § 17-5-30] (Emphasis supplied)." Thus defendants' remaining state statutory argument is without merit. With regard to defendants' federal Fourteenth Amendment due process/fundamental fairness argument,

defendants have not cited, nor can we find, any authority for the proposition that they are entitled to relief on this basis on their motion to suppress. Thus, it is equally rejected. We decline to comply with defendants' request to "fashion a remedy," i.e., the suppression of evidence, for the misconduct which transpired.

b) Hospital records. The GBI agent's reference in his wiretap warrant affidavit to Mr. Duncan's hospitalization for a gunshot injury is insignificant in light of the other evidence set forth in the affidavit. The affidavit contained evidence from another source, a confidential informant, that Mr. Duncan had been shot as a result of his failure to pay for a shipment of marijuana. Thus, any evidence obtained through the hospital subpoena was merely cumulative. Moreover, even if the trial court omitted all gunshot references from consideration, there was a substantial basis for the court to conclude probable cause existed to issue the warrant. Any error was harmless to the issuance of the warrant.

2. The Duncans next allege that disclosures were made of information obtained from the wiretap in violation of OCGA § 16-11-64(b)(8), to the Tennessee Bureau of Investigation, the GBI, the Dade County Sheriff's Office, the Georgia State Patrol, and law enforcement officials in Illinois and Kansas, thereby rendering the evidence disclosed inadmissible.

The statute invoked provides, "Any publication for [sic] the information or evidence obtained under a warrant issued hereunder [for interception of wire or oral transmissions by law enforcement] other than that necessary and essential to the preparation of and actual prosecution *for the crime specified in the warrant* shall be an unlawful invasion of privacy under this part and shall cause such evi-

dence and information to be inadmissible in any criminal prosecution. [Emphasis supplied.]"

While acknowledging that 18 U.S.C. § 2517 specifically authorizes any investigative or law enforcement officer to "disclose such contents to another investigative officer to to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure," defendants argue that [*OCGA* § 16-11-64(b)(8)] is rather what is reasonably may be disclosed to that necessary and essential with regard to the prosecution for only that crime specified in the warrant. Here the trial court entered court orders authorizing that the information be disclosed to spur or further investigation of other drug transactions involving Mr. Duncan and various associates. "We do not read the Georgia statutes as countermanding the specific authorization of the U.S. Congress." *Morrow v. State,* 147 Ga. App. 395, 399(4) (249 SE2d 110) (1978).

"The construction to be given [Code Ann. § 26-3004(k)] [OCGA §16-11-64(b)(8)] is rather what is reasonably necessary and essential to the preparation of and actual prosecution for a crime. What is reasonable will depend upon the facts of a given case and must necessarily rest in the controlled discretion of the district attorney, subject to review by the trial court. Where there is evidence to support the decision of a trial judge . . . that decision will not be disturbed on appeal. [Cits.]" *Cox v. State,* 152 Ga. App. 453, 463(3) (263 SE2d 238) (1979). This is true even where the information obtained broadens the scope of the pending investigation and gives probable cause to seek additional wiretaps and to intercept the conversations of additional parties. Id. Defendants' enumeration is therefore meritless.

3. The Duncans contend that all evidence from the wiretap must be excluded because, in addition to the authorized reel-to-reel recorder, investigating officers used a cassette recorder which was unauthorized by the warrant, violating OCGA §§ 16-11-64(b)(1), (4), (6) & (7), and that in failing to return the cassette tapes to the warrant-issuing court, they also violated 18 U.S.C. § 2518(8)(a).

In *Little v. State,* 157 Ga. App. 462, 464-465 (5) (276 SE2d 17) (1981), defendants asserted state and federal violations in that police made duplicative cassette tapes without judicial authorization in addition to the reel-to-reel tapes, and later destroyed them also without judicial authorization. Noting the cassettes were made to facilitate transcription to a log and to enable the police to follow up on offenses that might be revealed, the court rejected the argument, reasoning, "Federal statute anticipates that such partial or duplicate tapes will be made and requires no prior judicial approval for duplication. 18 USC 2518 (8)(a) states in part: '. . . [d]uplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations.' Similarly OCGA § 16-1-64(b) does not prohibit the making of duplicate recordings. "The reel-to-reel original tapes were kept and returned to court and there is no requirement [state or federal] that the duplicate recordings be sealed or kept nor is their destruction prohibited when they have served their purpose." Id at 465. Accordingly, we find no state or federal violation here.

4. Next argued is that the exclusion of all wiretap evidence is mandated because the court clerk published the wiretap documents in the minute book of Dade County, violating OCGA § 16-11-64(b)(5).

Although OCGA§ 16-11-64(b)(5) requires that the ap-

plication for an investigation warrant and all supporting evidence in connection with it remain confidential and in the custody of the judge, disclosure is authorized "upon written order of the judge or . . . at the time of trial of the case in which such evidence is used or in which evidence derived from such surveillance is used." Here, the evidence reflects that the clerk placed the documents on the minute book on Saturday August 11, 1984 for certification for their use in the motion to suppress hearing on Monday August 13, 1984. Since the documents were needed, and subsequently introduced, at the motion to suppress hearing, and since there is no evidence that any unauthorized persons saw the material, and on August 13 at 9 a.m. they were locked up and soon placed in a safety deposit box, we find no violation. See *Cox v. State*, 152 Ga. App. 453, 466 (3) (263 SE2d 2238) (1979).

The order which defendants complain is still of record in the minute book, and not locked in the safety deposit box, includes no information about, or even any mention of, the existence of a wiretap. It simply provides that "certain records be filed with the Clerk of Superior Court" and that these records be kept in a safety deposit box.

5. Mr. and Mrs. Duncan assert that an unauthorized individual, an FBI agent, monitored phone conversations and that this constituted an illegal publication.

The warrant authorized only "[the] District Attorney of the Lookout Mountain Judicial Circuit, his Assistants or a law enforcement officer or agent under his direction and control permanently or temporarily" to participate in the wiretap. The Duncans argue that the FBI agent was not under the direction or control of the district attorney but rather fell under the control and supervision of his immediate supervisors at the bureau, the director of the bureau, and the United States Attorney.

The Duncans' position is tenuous at best. As the FBI agent was a law enforcement official aiding in the investigation at issue, he fell within the "direction and control" of the District Attorney language of the warrant.

6. Also alleged is that the affidavit in support of the wiretap warrant contained "material nontruths, and were based upon stale and unreliable information," thereby vitiating the probable cause for the search. Again it is not clear whether they are proceeding under the state or federal constitution. The enumeration fails in either event, as the standard is the same. See *Williams v. State*, 251 Ga. 749-796 (8bii) (312 SE2d 40) (1983). *Williams, supra.*

Nor do we conclude that the affidavit is stale. The latest information included was obtained within 5 days of the affidavit and issuance of the warrant and the information was "so near in point of time to the making of the affidavit and execution of the search warrant 'as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant.' [Cit.]" *Kouder v. State*, 154 Ga. App. 597, 599 (2) (269 SE2d 92) (1980).

7. We have reviewed the remaining enumerations of error and find them to be totally without merit.

While affirming the convictions in these cases as a matter of law, we must express displeasure with the undisputed fact that the law enforcement officers used bogus subpoenas in the furtherance of a criminal investigation.

When faced with instances of prosecutorial misconduct, the courts, federal and state, have repeatedly disapproved of such tactics – even in instances where suppression of evidence or reversal of conviction was not ordered. As ear-

ly as 1954, in *Durbin v. United States*, 221 F2d 520 (D.C. Cir. 1954), the United States Court of Appeals found it inexcusable and clearly improper for the United States Attorney to use a subpoena to force the appearance of a witness at his office rather than before a grand jury. This same approach was taken in an analagous situation in *Katz v. United States*, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967), where the United States Supreme Court reversed a conviction where electronic eavesdropping was carried out at a public telephone booth without a warrant. In discussing the investigative process used there, *Katz*, at 357, stated: "[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.' [Cit.] 'Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes' [Cit.]. . ."

Appellee cites in support of the process used in the case in chief *Kesler v. State*, 249 GA. 462 (291 SE2d 497) (1982), and *Culpepper v. State*, 156 Ga. App. 331 (274 SE2d 616) (1980). However, the situations there are clearly distinguishable from the situation here, for those telephone records (*Kelser*) and bank records (*Culpepper*) were obtained through court order and not bogus subpoenas.

It is interesting to note that while the United States Supreme Court, in *United States v. Miller*, 425 U.S. 425 (96 SC 1619, 48 LE2d 71) (1976), in denying a motion to suppress, ruled that a bank depositor has no protectable Fourth Amendment interest in bank records obtained with defective subpoenas, it never approved of such a tactic as being a legitimate and court-sanctioned investigative procedure.

A review of cases in other states shows that in *State v. Eder*, 103 N.M 211 (704 P2d 465) (1985), the Court of Appeals of New Mexico ordered the suppression of evidence where a bogus subpoena duces tecum was used to obtain financial records. In doing so, the court directed our attention to 1 ABA, *Standards for Criminal Justice, The Prosecution Function,* 3-3.1(d) (2d ed. 1980): "it is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena." *Eder*, at 467, went on to say that "[t]he use of a subpoena or a document that looks like a subpoena for conducting pre-trial interviews is unauthorized, improper, and a usurpation of judicial power."

This court, as recently as 1982, in *Sacchinelli v. State*, 161 Ga. App. 763 (288 SE2d 894) (1982), while upholding the conviction in an illegal drug case, went to great lengths to state its clear and unmistakable aversion to the use of bogus subpoenas by law enforcement officers in the furtherance of a criminal investigation.

The above-mentioned cases repeatedly and forthrightly condemn prosecutorial misconduct. As a court we cannot on the one hand preach the virtues of obedience to law to the general public and at the same time wink at disobedience to law by law enforcement officers on the other hand.

In upholding this conviction I can only take solace in the words of *Eder,* supra at 468, quoting from *United States v. Blue*, 384 U.S. 251, 255 (86 SC 1416, 16 LE2d 510) (1966): "[T]he barring of prosecution altogether in such a circumstance, 'might advance marginally some of the ends served by exclusionary rules, but it would also increase to

an intolerable degree interference with the public interest in having the guilty brought to book.' "

Judgments affirmed. Deen, P.J., and Benham, J., concur.

APPENDIX "D"

COURT OF APPEALS.
OF THE STATE OF GEORIGA

Atlanta, July 31, 1986

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

72189. DELVIN RICHARD VAN NICE et al v. THE STATE OF GEORGIA

72190. LAWRENCE DUNCAN et al v. THE STATE OF GEORGA

Upon consideration of motions for rehearing filed on behalf of appellants in the above cases, said motions are hereby denied. It is further odered that pages 9 through 22 attached hereto be substituted for pages 9 through 22 of the opinion dated July 16, 1986.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, July 31, 1986

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk.

72190.

The appeal of Mr. and Mrs. Duncan.

1. The Duncans contend that the wiretap was illegal "in that the same was obtained through use of illegal, sham subpoenas issued in non-existent cases," and therefore all evidence obtained as a result is inadmissible under the U.S. Constitution's Fourth and Fourteenth Amendments, state statutes OCGA § 17-5-30 and OCGA § 16-11-67 and Ga. Const. 1983, Art. I, Sec. 1, Par. XIII (former Ga. Const. 1976, Art. I, Sec. I, Par. X).[1]

A) The telephone toll records. Although the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. "Like bank records, telephone toll and billing records are not owned or possessed by the defendant, but are business records belonging to the telephone company. *United States v. Baxter,* 492 F.2d 150, 167 (9th Cir. 1973). *Katz v. United States,* 389 U.S. 3478 (88 SC 507, 19 LE2d 576) (1967), urged by the defendants, recognizes the right of privacy in the contents of the telephone *conversation,* not in the toll and billing records of the telephone company. Thus, neither defendant . . . ha[s] standing to object to the production of these records by the telephone company . . . It follows that the trial court did not err in refusing to suppress them or in admitting them into evidence at the trial." *Kesler v. State,* 249 Ga. 462, 469-470 (5) (291 SE2d 497) (1982). Thus, defendants

[1]The Georgia Constitution is not supported by argument in defendants' original brief so it is not addressed. Defendants' attempt to preserve this argument by addressing it in their supplemental brief does not save it. *Bicknell v. Joyce Sportswear Co.*, 173 Ga. App. 897, 898, (3) (328 SE2d 564) (1985).

lack standing under the federal constitution to challenge the procedure by which the telephone records were obtained, and the warrant to tap which was subsequently issued.

Nor do defendants have standing under state statute OCGA § 17-5-30 to make such argument since they were not "aggrieved' 'by the seizure of the toll records because the records belong to the phone company. *Romano,* supra; *Kesler,* supra.

Sacchinelli v. State, 161 Ga. App. 763, 764 (288 SE2d 894) (1982), cited by defendants, which also involved sham subpoenas and a wiretap issued as a result of information gained, is inapposite to the case at bar because it involved the seizure of telephone conversation [sic] in which defendant had a privacy interest, not telephone toll records.

Defendants' argument that OCGA § 16-11-67 provides them with the relief they are seeking has been rejected in *Kesler,* supra, the court concluding that Code Ann. §§ 26-3001, 26-3007 [OCGA §§ 16-11-62. 16-11-67], while applicable to the content of telephone conversations, do not extend to include telephone company records.

As stated in *Romano,* supra at 819, "[t]he *only* [Georgia] authority for a motion to suppress is Ga. Code § 27-313 [OCGA § 17-5-30] (Emphasis supplied)." Thus defendants' remaining state statutory argument is without merit. With regard to defendants' federal Fourteenth Amendment due process fundamental fairness argument, defendants have not cited, nor can we find, any authority for the proposition that they are entitled to relief on this basis on their motion to suppress. Thus, it is equally rejected. We decline to comply with defendants' request to "fashion a remedy," i.e., the suppression of evidence, for the misconduct which transpired.

b) Hospital records. The GBI agent's reference in his wiretap warrant affidavit to Mr. Duncan's hospitalization for a gunshot injury is insignificant in light of the other evidence set forth in the affidavit. The affidavit contained evidence from another source, a confidential informant, that Mr. Duncan had been shot as a result of his failure to pay for a shipment of marijuana. Thus, any evidence obtained through the hospital subpoena was merely cumulative. Moreover, even if the trial court omitted all gunshot references from consideration, there was a substantial basis for the court to conclude probable cause existed to issue the warrant. Any error was harmless to the issuance of the warrant.

2. The Duncans next allege that disclosures were made of information obtained from the wiretap in violation of OCGA § 16-11-64(b)(8), to the Tennessee Bureau of Investigation, the GBI, the Dade County Sheriff's Office, the Georgia State Patrol, and law enforcement officials in Illinois and Kansas, thereby rendering the evidence disclosed inadmissible.

The statute invoked provides, "Any publication for [sic] the information or evidence obtained under a warrant issued hereunder [for interception of wire or oral transmissions by law enforcement] other than that necessary and essential to the preparation of and actual prosecution *for the crime specified in the warrant* shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be inadmissible in any criminal prosecution. [Emphasis supplied.]"

While acknowledging that 18 U.S.C. § 2517 specifically authorizes any investigative or law enforcement officer to "disclose such contents to another investigative officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or

receiving the disclosure," defendants argue that OCGA § 16-11-64 is more restrictive, limiting that which may be disclosed to that necessary and essential with regard to the prosecution for only that crime specified in the warrant. Here the trial court entered court orders authorizing that the information be disclosed to spur or further investigation of other drug transactions involving Mr. Duncan and various associates. "We do not read the Georgia statutes as countermanding the specific authorization of the U.S. Congress." *Morrow v. State,* 147 Ga. App. 395, 399(4) (249 SE2d 110) (1978).

"The construction to be given [Code Ann. § 26-3004(k)] [OCGA § 16-11-64(b)(8)] is rather what is reasonably necessary and essential to the preparation of and actual prosecution for a crime. What is reasonable will depend upon the facts of given case [sic] and must necessarily rest in the controlled discretion of the district attorney, subject to review by the trial court. Where there is evidence to support the decision of a trial judge . . . that decision will not be disturbed on appeal. [Cits.]" *Cox v. State,* 152 Ga. App. 453, 463 (3) (263 SE2d 238) (1979). This is true even where the information obtained broadens the scope of the pending investigation and gives probable cause to seek additional wiretaps and to intercept the conversations of additional parties. Id. Defendants' enumeration is therefore meritless.

3. The Duncans contend that all evidence from the wiretap must be excluded because, in addition to the authorized reel-to-reel recorder, investigating officers used a cassette recorder which was unauthorized by the warrant, violating OCGA §§ 16-11-64(b)(1), (4), (6) & (7), and that in failing to return the cassette tapes to the warrant-issuing court, they also violated 18 U.S.C. § 2518(8)(a).

In *Little v. State*, 157 Ga. App. 462, 464-465 (5) (276 SE2d 17) (1981), defendants asserted state and federal violations in that police made duplicative cassette tapes without judicial authorization in addition to the reel-to-reel tapes, and later destroyed them also without judicial authorization. Noting the cassettes were made to facilitate transcription to a log and to enable the police to follow up on offenses that might be revealed, the court rejected the argument, reasoning, "Federal statute anticipates that such partial or duplicate tapes will be made and requires no prior judicial approval for duplication. 18 U.S.C. § 2518(8)(a) states in part: '. . . [d]uplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations.' Similarly, OCGA § 16-11-64(b) does not prohibit the making of duplicate recordings. "The reel-to-reel original tapes were kept and returned to court and there is no requirement [state or federal] that the duplicate recordings be sealed or kept nor is their destruction prohibited when they have served their purpose." Id. at 465. Accordingly, we find no state or federal violation here.

4. Next argued is that the exclusion of all wiretap evidence is mandated because the court clerk published the wiretap documents in the minute book of Dade County, violating OCGA § 16-11-64(b)(5).

Although OCGA § 16-11-64(b)(5) requires that the application for an investigation warrant and all supporting evidence in connection with it remain confidential and in the custody of the judge, disclosure is authorized "upon written order of the judge or . . . at the time of trial of the case in which such evidence is used or in which evidence derived form such surveillance is used." Here, the evidence reflects that the clerk placed the documents on the minute

book on Saturday, August 11, 1984 for certification for their use in the motion to suppress hearing on Monday, August 13, 1984. Since the documents were needed, and subsequently introduced, at the motion to suppress hearing, and since there is no evidence that any unauthorized persons saw the material, and on August 13 at 9 a.m. they were locked up and soon placed in a safety deposit box, we find no violation. See *Cox v. State,* 152 Ga. App. 453, 466 (3) (263 SE2d 238) (1979).

The order which defendants complain is still of record in the minute book, and not locked in the safety deposit box, includes no information about, or even any mention of, the existence of a wiretap. It simply provides that "certain records be filed with the Clerk of Superior Court" and that these records be kept in a safety deposit box.

5. Mr. and Mrs. Duncan assert that an unauthorized individual, an FBI agent, monitored phone conversations and that this constituted an illegal publication.

The warrant authorized only "[the] District Attorney of the Lookout Mountain Judicial Circuit, his Assistants or a law enforcement officer or agent under his direction and control permanently or temporarily" to participate in the wiretap. The Duncans argue that the FBI agent was not under the direction or control of the district attorney but rather fell under the control and supervision of his immediate supervisors at the bureau, the director of the bureau, and the United States Attorney.

The Duncans' position is tenuous at best. As the FBI agent was a law enforcement official aiding in the investigation at issue, he fell within the "direction and control" of the District Attorney language of the warrant.

6. Also alleged is that the affidavit in support of the

wiretap warrant contained "material nontruths, and were based upon stale and unreliable information," thereby vitiating the probable cause for the search. Again it is not clear whether they are proceeding under the state or federal constitution. The enumeration fails in either event, as the standard is the same. See *Williams v. State,* 251 Ga. 749-496 (8bii) (312 SE2d 40) (1983). *Williams,* supra.

Nor do we conclude that the affidavit is stale. The latest information included was obtained within 5 days of the affidavit and issuance of the warrant and the information was "so near in point of time to the making of the affidavit and execution of the search warrant 'as to create a reasonable belief that the same conditions described in the affidavit still prevailed at the time of the issuance of the warrant.' [Cit.]" *Kouder v. State,* 154 Ga. App. 597, 599 (2) (269 SE2d 92) (1980).

7. We have reviewed the remaining enumerations of error and find them to be totally without merit.

While affirming the denial of the motions to suppress in these cases as a matter of law, we must express displeasure with the undisputed fact that the law enforcement officers used bogus subpoenas in the furtherance of a criminal investigation.

When faced with instances of prosecutorial misconduct, the courts, federal and state, have repeatedly disapproved of such tactics — even in instances where suppression of evidence or reversal of conviction was not ordered. As early as 1954, in *Durbin v. United States,* 221 F2d 520 (D.C. Cir. 1954), the United States Court of Appeals found it inexcusable and clearly improper for the United States Attorney to use a subpoena to force the appearance of a witness at his office rather than before a grand jury. This same approach was taken in an analogous situation in

Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967), where the United States Supreme Court reversed a conviction where electronic eavesdropping was carried out at a public telephone booth without a warrant. In discussing the investigative process used there, *Katz*, at 357, stated: "[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.' [Cit.] 'Over and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes' [Cit.]. . ."

Appellee cites in support of the process used in the case in chief *Kesler v. State*, 249 Ga. 462 (291 SE2d 497) (1982), and *Culpepper v. State*, 156 Ga. App. 331 (274 SE2d 616) (1980). However, the situations there are clearly distinguishable from the situation here, for those telephone records (*Kelser*) and bank records (*Culpepper*) were obtained through court order and not bogus subpoenas.

It is interesting to note that while the United States Supreme Court, in *United States v. Miller*, 425 U.S. 435 (96 SC 1619, 48 LED2d 71) (1976), in denying a motion to suppress, ruled that a bank depositor has no protectable Fourth Amendment interest in bank records obtained with defective subpoenas, it never approved of such a tactic as being a legitimate and court-sanctioned investigative procedure.

A review of cases in other states shows that in *State v. Eder*, 103 N.M. 211 (704 P2d 465) (1985), the Court of Appeals of New Mexico ordered the suppression of evidence where a bogus subpoena duces tecum was used to obtain financial records. In doing so, the court directed our attention to 1 ABA, *Standards for Criminal Justice, The Prosecution Function*, 3-3.1(d) (2d ed. 1980): "It is

unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena." *Eder,* at 467, went on to say that "[t]he use of a subpoena or a document that looks like a subpoena for conducting pre-trial interviews is unauthorized, improper, and a usurpation of judicial power."

This court, as recently as 1982, in *Sacchinelli v. State,* 161 Ga. App. 763 (288 SE2d 894) (1982), while upholding the conviction in an illegal drug case, went to great lengths to state its clear and unmistakable aversion to the use of bogus subpoenas by law enforcement officers in the furtherance of a criminal investigation.

The above-mentioned cases repeatedly and forthrightly condemn prosecutorial misconduct. As a court we cannot on the one hand preach the virtues of obedience to law to the general public and at the same time wink at disobedience to law by law enforcement officers on the other hand.

In upholding the denial of the motions to suppress I can only take solace in the words of *Eder,* supra at 468, quoting from *United States v. Blue,* 384 U.S. 251, 255 (86 SC 1416, 16 LE2d 5410) (1966): "[T]he barring of prosecution altogether in such a circumstance, 'might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.' "

Judgments affirmed. Benham, J., concurs. Deen, P.J., concurs in the judgment only.

APPENDIX "E"

COURT OF APPEALS
OF THE STATE OF GEORIGA

Atlanta, October 29, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

APPLICATION NUMBER 3021
LAWRENCE DUNCAN et al v. THE STATE

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby granted. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of Superior Court is directed to include a copy of this order in the record transmitted to the Court of Appeals.

22-29

84-0333
84-0335

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, October 29, 1985

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk.

APPENDIX "F"

IN THE SUPERIOR COURT, EASTERN JUDICIAL CIRCUIT, GEORGIA

STATE OF GEORGIA	)	
	)	
vs.	)	INDICTMENT NO. 084-0333
	)	
LAWRENCE DUNCAN, MARGARET DUNCAN, PAMELA LONG, DAVID VAN NICE and DELVIN VAN NICE	)	
	)	
STATE OF GEORGIA	)	
	)	
vs.	)	INDICTMENT NO. 084-0335
	)	
MARGARET DUNCAN	)	
STATE OF GEORGIA	)	
	)	
vs.	)	INDICTMENT NO. 084-0347
	)	
PAMELA LONG	)	
STATE OF GEORGIA	)	
	)	
vs.	)	INDICTMENT NO. 084-0356
	)	
PAUL RESTREPO	)	

ORDER

Motions to suppress the above indictments were consolidated for argument. Evidence was presented in the Court over a period of approximately two weeks. Subsequent thereto the Defendants submitted extensive briefs covering the objections in great detail. These briefs were answered

by a brief from the District Attorney, which was also in considerable detail. The Court has studied these briefs over a period of time, has read the cases cited and considered the theories of law presented.

It is the Court's opinion after hearing the evidence over an extended period of time, taking considerable personal notes, reading the briefs of both the State and the Defendants, studying the cases cited and theories presented, that Defendants' Motion to Suppress wiretap evidence and the search of the premises involved should be denied.

IT IS SO ORDERED.

This 13th day of September, 1985.

/s/ Frank S. Cheatham, Jr.
Frank S. Cheatham, Jr., Chief Judge
Superior Court, E.J.C., Ga.

cc: Mr. Alex Zipperer
Mr. John Wright Jones
Mr. William Cox
Mr. David T. Lock

FILED IN OFFICE
SEP 13 1985
/s/ BILLY B. TAYLOR
Dep. Clerk, Superior Court
Chatham County GA.

APPENDIX "G"

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED
(Rule 21.1(f))

(i) 18 USC §2510. DEFINITIONS

As used in this chapter [18 USCS §§2510 et seq.]

11. "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(ii) 18 U.S.C. §2518. PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter [18 USCS §§2510 et seq.] shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (1) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be

intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentry evidence in support of the application.

(3) Upon such application the judge may enter an ex parte

order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that –

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [18 USCS §2516];

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter [18 USCS §§2510 et seq.] shall specify –

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter [18 USCS §§2510 et seq.] shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than

thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter [18 USCS §§ 2510 et seq.], and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter [18 USCS §§2510 et seq.], the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter [18 USCS §§2510 et seq.], any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney or any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that –

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter [18 USCS §§2510 et seq.] to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in

accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for approval is denied, whichever is earlier. In the event such application for the order is denied or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter [18 USCS §§2510 et seq.], and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(1) The contents of any wire or oral communication intercepted by any means authorized by this chapter [18 USCS §§2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provision of subsections (1) and (2) of Section 2517 of this chapter [18 USCS §2517(1), (2)] for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral com-

munication or evidence derived therefrom under subsection (3) of section 2517 [18 U.S.C.S. §2517(3)].

(b) Applications made and orders granted under this chapter [18 USCS §2510 et seq.] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of this issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) [18 USCS §2518(7)(b)] which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communica-

tions, applications and orders as the judge determines to be in the interest of justice. On an ex-parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter [18 USCS §§2510 et seq.] or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(1) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter [18 USCS §§2510 et seq.], or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the ground of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 USCS §§2510 et seq.]. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (1) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(iii) FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

(iv) SECTION I OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or propety, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

(v) FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "H"

REFERENCE TO FEDERAL QUESTIONS RAISED BELOW AND RULINGS THEREON
(Rule 21.1 (h))

Questions involving the federal constitution and federal statutes were raised and ruled upon as set forth herein.

The within case arose of as a result of a surveillence and eventual search and arrest of Petitioners in their automobile during Petitioners' trip from Trenton, Dade County, Georgia, to Savannah, Chatham County, Georgia. It is undisputed that the Georgia Bureau of Investigation initiated the surveillance and executed the search as a result of a G.B.I. wiretap on Petitioners' home phone, the interception order being entered by a Georgia Superior Court judge on March 10, 1983. The warrant and subsequent wiretap were purportedly conducted pursuant to 18 USC § 2518 *et seq.* and the Georgia wiretap statute, O.C.G.A. § 16-11-60 *et seq.*

After indictment Petitioners filed motions to suppress all phone conversations obtained as a result of the wiretap, said motions being filed on April 19, 1984. In the motions, Petitioners asserted that the wiretap warrant and subsequent wiretap were illegal and entered in violation of the Fourth and Fourteenth Amendments to the United States Constitution and in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC §§ 2510-2520.

On September 13, 1985, after two weeks of testimony, the Superior Court of Chatham County, Georgia, denied Petitioners' Motion to Suppress finding no violation of the federal constitution, no violation of USC §§ 2510-2520 and no violation of Georgia law. [Appendix "F"].

On September 23, 1985, the trial judge entered an order certifying that the issues raised on the motion were of such importance that an interlocutory appeal should be granted.

On October 29, 1985, the Court of Appeals of Georgia consented to hear the appeal [Appendix "E"], and on July 16, 1986, entered an opinion affirming the trial court's denial of Petitioners' Motion to Suppress. [Appendices "C" and "D"]. In that opinion, the Court of Appeals ruled that, "although the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. 'Like bank records, telephone toll and billing records are not owned or possessed by the Defendant, but are business records belonging to the telephone company . . . .' Thus, Defendants lack standing under the federal constitution to challenge the procedures by which the telephone records were obtained and the warrant to tap which was subsequently issued." [Appendix, pp. 19a-20a]. The Court also ruled by implication that no standing was conferred under 28 USC § 2510(10)(a)(i) and § 2510(11).

The Court went on to rule that although the Duncans did possess standing to contest the wiretap on grounds other than the illegality of the prior subpoenas, that the wiretap was not entered or conducted in violation of the Fourth or Fourteenth Amendments to the Federal Constitution or in violation of 28 USC § 2510 *et seq.*

The Court of Appeals further ruled that suppression was not required as a result of the investigating officers' use of a cassette recorder which was unauthorized by the warrant, as a result of their failure to return the dupli-

cate cassette tapes to the issuing judge or by their failure to have the said tapes sealed as required by 18 USC § 2518(8)(a). [Appendix, at p. 23a].

Finally, the Court ruled that the search of Petitioners' Lincoln automobile did not require suppression of a sum of money and a handgun seized from that auto. [Appendix at p. 25a].

On July 31, 1986, the Court of Appeals denied Petitioners Motion for Rehearing. [Appendix "D"].

On October 9, 1986, the Supreme Court of Georgia denied Petitioners Application for a Writ of Certiorari, and on October 28, 1986, rehearing was denied with three of seven justices dissenting. [Appendices "A" and "B"].

APPENDIX "I"

EX PARTE:
INVESTIGATION WARRANT NO. 01-0210-21-83
DADE COUNTY, GEORGIA

David L. Lomenick, District Attorney
Lookout Mountain Judicial Circuit

INVESTIGATION WARRANT

Upon consideration of the petition under oath of David L. Lomenick as District Attorney of the Lookout Mountain Judicial Circuit, and other evidence adduced before me in support of the allegations thereof, I find that the Petitioner has been informed of such facts and circumstances by reasonably trustworthy informational sources to lead a man of reasonable caution to believe that the crimes of unlawful delivery, distribution, sale and possession with intent to distribute, among others of the following controlled substances:

(1) Methaqualone, in violation of § 16-13-25(5), 30(b)(d), O.C.G.A.

(2) Cocaine, in violation of § 16-13-26, 30(b)(e), O.C.G.A.

(3) Marijuana, in violation of § 16-13-30(j) O.C.G.A., and

(4) Trafficking in cocaine, marijuana and methaqualone, in violation of O.C.G.A. § 16-13-31 (a)(c) and (d) respectively,

all in violation of the Georgia Controlled Substances Act, have been committed, are being committed and are

about to be committed as alleged in the Petition, and on the basis of the facts in the Petition, I find that:

(a) there is probable cause for belief that the individuals named in the Petition have committed, are committing and are about to commit said offenses;

(b) there is probable cause for belief that particular communications of the type described in said Petition and supporting affidavit which is annexed hereto and incorporated herein by reference, concerning said offenses will be obtained through the interception for which an investigation warrant is prayed;

(c) normal investigative procedures have been tried and have failed and reasonably appear unlikely to succeed if tried;

(d) there is probable cause for belief that the facilities from which the wire or oral communications are to be intercepted have been used, are being used and are about to be used in connection with the commission of said offenses, are listed in the name of or commonly used by the individuals named in the Petition; and

(e) probable cause has been shown for the issuance of an Investigation Warrant as prayed.

I find that the Petition and supporting Affidavit as set forth show such exigencies as to overcome and override the need for giving notice of surveillance under this Warrant to the parties to be overheard, and it is adjudged that no notice of the issuance of this Warrant or of any actions and doings connected with its execution shall be given to any person, other than as authorized by law.

Pursuant to the provisions of 18 U.S.C. 2518 and Official Code of Georgia Annotated § 16-11-64, the said District Attorney, Assistants and law enforcement officers and agents under his direction and control permanently or temporarily, are hereby authorized to conduct a surveillance of Lawrence R. "Red" Duncan, William Condon Graham, Charles Edward Fleming, Jr., Gerland Gass, Jim Garner, Garland E. Smith, Emanual Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie and other unknown persons relating to the crimes of unlawful delivery, distribution, sale and possession with intent to distribute, among others of the following controlled substances:

(1) Methaqualone, in violation of § 16-13-25(5), 30(b)(d), O.C.G.A.

(2) Cocaine, in violation of § 16-13-26, 30(b)(e), O.C.G.A.

(3) Marijuana, in violation of § 16-13-30(j) O.C.G.A., and

(4) Trafficking in cocaine, marijuana and methaqualone, in violation of O.C.G.A. § 16-13-31(a)(c) and (d) respectively,

all in violation of the Georgia Controlled Substances Act and to intercept wire or oral communications by any of said persons or by any other unknown persons relating to said crimes.

Said surveillance shall begin at 5:09 o'clock p.m. on the 10th day of March, 1983; shall be authorized to continue

for a period of 20 day(s) and, in any event, shall cease at 4:15 o'clock p.m. the 30th day of March, 1983.

Since said offenses, discussions and conversations are determined by the Court to be of a continuing nature because of the facts and circumstances set out in the Affidavits and Petition attached hereto, and incorporated by reference herein, and will continue throughout the period of the surveillance, said surveillance shall not cease immediately upon the seizure of the *first* conversations and discussions relative to said offenses, but shall continue for the entire authorized 20-day period, until all such conversations and discussions between said parties are seized, at which point said surveillance shall terminate forthwith.

Said District Attorney, law enforcement officers, agents and Assistants in the execution of this Warrant are authorized to locate, place, use and employ the following devices, instruments and apparatus:

A remote control device "slave" connected directly to the telephone line of the following phone number (404) 657-6393, located in the residence of Lawrence R. "Red" Duncan residing at Star Route, Trenton, Georgia on top of Sand Mountain, on Georgia Highway 301, in Dade County, Georgia. This device "slave" is remotely controlled by the "slaves" parent device which is located at the monitoring location in Dade County, Ga. The parent device of the "slave" will be connected to a telephone line to the telephone company central office, the "slave" also connected by a standard telephone line to the telephone company central office. The control device has a dial mechanism which is utilized to dial the telephone number assigned to the remote device, "slave." When the central unit dials the number assigned to the "slave," the "slave"

will automatically answer and turn on, thus making an electronic connection to the telephone line to be intercepted. Once connection is made between the remote device, "slave" and the controlling device via the standard telephone lines, the remote device transmits an interrogation signal to the controlling device. If the remote device receives the proper reply of the controlling device, the remote device "slave" will then begin to transmit all "on-hook" or "off-hook" and ringing and dialing information to the controlling device. Upon occurrence of an "off-hook" indication of the telephone line for (404) 657-6393, the remote device "slave" will transmit all voice communications via the telephone line to the controlling device, which is directly connected to a dialed number recorder which decodes all information transmitted by the remote device, "slave," with regard to "on-hook," "off-hook" information, ringing and dialing information. The dialed number recorder will provide a paper tape print-out of the time of each occurrence, of "on-hook," "off-hook," ringing and outgoing numbers dialed. The dialed number recorder prints the type of information, "on-hook," "off-hook," ringing by symbols on the paper tape. For an outgoing telephone call, the dialed number recorder, decodes and prints the telephone number that has been dialed by the intercepted telephone. The dialed number decoder further decodes the "on-hook" "off-hook" information and turns the tape recorder on for an "off-hook," and off for an "on-hook." The dialed number recorder is directly connected to a tape recorder and the tape recorder turned on by the dialed number recorder and records all communications transmitted by the remote device "slave" via telephone line to the control device, communications passing through the control device, the dial number recorder and to the tape recorder to be recorded. Said remote

device to be activated and begin transmissions whenever the above mentioned telephone or its extensions are removed from its cradle and to cease transmissions automatically upon the return of said telephone or its extensions to said cradle. All of said devices, instruments and apparatus will be physically located and utilized in Dade County, Georgia.

Provided, however, said devices shall be monitored continuously by said authorized personnel; and said personnel shall neither intercept nor record any conversation and discussions except those herein authorized, except to the extent required to eliminate from this surveillance such conversations and discussions.

No person other than said District Attorney of the Lookout Mountain Judicial Circuit, his Assistants or a law enforcement officer or agent under his direction and control permanently or temporarily shall in any manner participate in the employment of the devices, instruments and apparatus used in the execution of this Warrant, and said District Attorney, Assistants, law enforcement officers and agents are forbidden to record any conversation or discussions which are personal and private in nature or not specified in this warrant. This warrant shall be executed as soon as practicable.

The Trenton, Georgia Telephone Company is directed to furnish the applicant or his authorized agent, forthwith such technical assistance as is necessary to accomplish the interception unobtrusively and with a minimum of interference with services that the Trenton, Georgia Telephone Company is according to the person or persons whose communications are to be intercepted.

Let return hereof and report as required by law be made before me within thirty days of the date hereof.

This the 10th day of March, 1983, at 5:09 p.m.

/s/

JUDGE, SUPERIOR COURT,

LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

APPENDIX "J"

EX PARTE:
INVESTIGATION WARRANT NO. 01-0210-21-83
DADE COUNTY, GEORGIA

David L. Lomenick, District Attorney
Lookout Mountain Judicial Circuit

APPLICATION FOR INVESTIGATION WARRANT

TO THE SUPERIOR COURT OF SAID COUNTY AND TO THE HONORABLE JOSEPH E. LOGGINS, JUDGE OF SAID COURT:

The petition of David L. Lomenick as District Attorney of the Lookout Mountain Judicial Circuit respectfully shows:

1.

Petitioner has probable cause to believe, upon the basis of facts and circumstances which have come to Petitioner's knowledge and attention from trustworthy informational sources, and accordingly avers upon information and belief that Lawrence R. "Red" Duncan, residing at Star Route, Trenton, Georgia on top of Sand Mountain, on Georgia Highway 301, in Dade County, Georgia, with telephone bearing number (404) 657-6393 installed in said residence, and William Condon Graham, Charles Edward Fleming, Jr., Gerland Gass, Jim Garner, Garland E. Smith, Emanual Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie, and other unknown persons

have committed, are committing and are about to commit the crimes of violation of the Georgia Controlled Substances Chapter, to wit: to unlawfully deliver, distribute, sell and possess with intent to distribute, among others, the following controlled substances:

(1) Methaqualone, in violation of § 16-13-25(5), 30(b)(d), O.C.G.A.

(2) Cocaine, in violation of § 16-13-26, 30(b)(e), O.C.G.A.

(3) Marijuana, in violation of § 16-13-30(j) O.C.G.A., and

(4) Trafficking in cocaine, marijuana and methaqualone, in violation of O.C.G.A. § 16-13-31(a)(c) and (d) respectively.

2.

The basis of probable cause referred to in paragraph one hereof are the facts and circumstances set out in the affidavit of Special Agent David B. Bonnell, Georgia Bureau of Investigation which is annexed hereto, incorporated in and made a part and portion of this Petition by reference as Exhibit A, being presently assigned to the Field Operations Section located in Calhoun, Georgia. Petitioner shows that he has been informed of the facts and circumstances set out in Exhibit A by Special Agent Bonnell who executed that affidavit. Petitioner further avers that he has been personally acquainted with Special Agent Bonnell for approximately two years and believes that said facts and circumstances are true. Petitioner shows that he has no information inconsistent with the facts and circumstances set forth in the affidavit of Special Agent Bonnell and that he believes said facts and circumstances to be true.

3.

Petitioner avers that in order to conduct a surveillance of the said Lawrence R. "Red" Duncan, William Condon Graham, Charles Edward Fleming, Jr., Gerland Gass, Jim Garner, Gerland E. Smith, Emanual Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie and other unknown persons to secure evidence and information with the view to prosecution of said persons who have committed, are committing, and are about to commit said offenses as set out in Exhibit "A" and which is incorporated herein by reference, it is necessary that petitioner use and employ certain hereinafter described devices, instruments, and apparatus, described as follows:

A remote control device "slave" connected directly to the telephone line of the following phone number (404) 657-6393, installed in the residence of Lawrence R. "Red" Duncan, Star Route, Trenton, Ga., located on top of Sand Mountain, on Georgia Highway 301, in Dade County, Ga., this device "slave" is remotely controlled by the "slave's" parent device which is located at the monitoring location in Dade County, Ga. The parent device of the "slave" will be connected to a telephone line to the telephone company central office, the "slave" also connected by a standard telephone line to the telephone company central office. The control device has a dial mechanism which is utilized to dial the telephone number assigned to the remote device, "slave." When the central unit dials the number assigned to the "slave," the "slave" will automatically answer and turn on, thus making an electronic connection to the telephone line to be intercepted. Once connection is made between the remote

device, "slave" and the controlling device via the standard telephone lines, the remote device transmits an interrogation signal to the controlling device. If the remote device receives the proper reply of the controlling device, the remote device "slave" will then begin to transmit all "on-hook" or "off-hook" and ringing and dialing information to the controlling device. Upon occurrence of an "off-hook" indication of the telephone line for (404) 657-6393, the remote device "slave" will transmit all voice communications via the telephone line to the controlling device, which is directly connected to a dialed number recorder which decodes all information transmitted by the remote device, "slave," with regard to "on-hook" "off-hook" information, ringing and dialing information. The dialed number recorder will provide a paper tape print-out of the time of each occurrence, of "on-hook," "off-hook," ringing and outgoing numbers dialed. The dialed number recorder prints the type of information, "on-hook," "off-hook," ringing by symbols on the paper tape. For an outgoing telephone call, the dialed number recorder, decodes and prints the telephone number that has been dialed by the intercepted telephone. The dialed number decoder further decodes the "on-hook" "off-hook" information and turns the tape recorder on for an "off-hook," and off for an "on-hook." The dialed number recorder is directly connected to a tape recorder and the tape recorder turned on by the dialed number recorder and records all communications transmitted by the remote device "slave" via telephone line to the control device, communications passing through the control device, the dial number recorder and to the tape recorder to be recorded. Said remote device to be activated and begin transmissions whenever the above mentioned telephone or its extensions are removed from its cradle and to cease transmissions

automatically upon the return of said telephone or its extensions to said cradle. All of said devices, instruments and apparatus will be physically located and utilized in Dade County, Georgia.

Petitioner avers that an Order to conduct such surveillance is necessary because;

(a) other investigative procedures have been tried and failed;

(b) because of the secrecy with which said persons conduct such unlawful enterprises other investigative procedures reasonably appear to be unlikely to succeed;

(c) because of the nature of the criminal enterprises involved other investigative procedures reasonably appear too dangerous to law enforcement personnel to be utilized, in that the employment of normal investigative techniques by such personnel could result in their death or injury.

4.

Petitioner avers that he has no knowledge of any previous application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the persons, facilities or places specified in this petition except: NONE, with the exception of the Pen Register utilized to identify out-going telephone calls dialed from telephone numbers 404-657-6393, as detailed in Exhibit A, which is not an interception of wire or oral communications, and requires no Court order, *Smith v. Maryland,* 1979, 442 U.S. 735, although one was obtained from Superior Court Judge Loggins.

Petitioner specifies as the discussions and conversations to be overheard and recorded, as all discussions and conversations between Lawrence R. "Red" Duncan, William Condon Graham, Charles Edward Fleming, Jr., Gerland Gass, Jim Garner, Garland E. Smith, Emanuel Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie and other unknown persons relating to the commission of the above mentioned crimes, and as set out in Exhibit "A" hereof, which is attached hereto and incorporated by reference herein. The conversations to be intercepted are those relating to the above said offenses.

6.

Petitioner avers, basing this averment upon the facts and circumstances set forth in this Petition and Exhibit A annexed, that if notice of surveillance by the use and employment of said devices, instruments and apparatus is given to the said Lawrence R. "Red" Duncan, William Condon Graham, Charles Edward Fleming, Jr., Gerland Gass, Jim Garner, Garland E. Smith, Emanual Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie and the other unknown persons they will refrain from discussing the aforesaid crimes alleged herein with each other and with said unknown persons and may flee and conceal themselves to avoid detection and arrest or may harm informants, or destroy evidence, and that the

exigencies of the situation overcome and override the need for giving notice of surveillance to the aforesaid persons named in this paragraph and to other unknown persons.

Wherefore, Petitioner prays:

(a) That an Investigation Warrant issue as provided by Section 16-11-64(b) Official Code of Georgia Annotated, authorizing Petitioner to conduct a surveillance of Lawrence R. "Red" Duncan, William Condon Graham, Charles Edward Fleming, Jr., Garland Gass, Jim Garner, Garland E. Smith, Emanual Louis Fleming, Gail Fleming, Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, Dennis Walden, C.L. Rains, Fred Robert Gomez, Willie F. Waldie and other unknown persons through the use of said devices, instruments, and apparatus, which surveillance shall begin at 4:15 o'clock p.m. on the 10th day of March, 1983, and shall cease in any event at 4:15 o'clock p.m. on the 30th day of March, 1983.

(b) Since said offense, discussions and conversations are deemed by the Petitioner to be of such a continuing nature because of the facts and circumstances set out in the Affidavit and Petition that they will continue throughout the period of the surveillance, that said surveillance shall not cease immediately upon the seizure of the *first* conversations and discussions relative to said offenses, but shall continue for the entire authorized 20-day period until all such conversations and discussions between said parties relative to the offenses herein

enumerated are seized, at which point said surveillance shall terminate forthwith.

/s/

David L. Lomenick
District Attorney

Lookout Mountain Judicial Circuit

Sworn to and subscribed
before me this 10th day of
March, 1983.
/s/ Paul M. Painter

APPENDIX K

GEORGIA, DADE COUNTY
IN THE SUPERIOR COURT OF DADE COUNTY

STATE OF GEORGIA

AFFIDAVIT FOR THE APPLICATION OF
AN ORDER AUTHORIZING THE INTERCEPTION
OF WIRE COMMUNICATIONS

David B. Bonnell, being duly sworn and under oath deposes; David B. Bonnell, hereafter referred to as the affiant, has been and is now a duly appointed special agent with the Georgia Bureau of Investigation where he has been so employed since September 15, 1980. Affiant is currently assigned within the Field Operations Section of the Georgia Bureau of Investigation to the regional office located in Calhoun, Georgia. Affiant is assigned as a special agent within the area of responsibility to Dade, Catoosa and Walker Counties. Affiant was previously assigned within the Georgia Bureau of Investigation to the Special Coastal Area Narcotics (SCAN) unit based in Savannah, Georgia. Prior to being employed by the Georgia Bureau of Investigation, affiant was an accredited special agent for the United States Army, Criminal Investigation Command (CID) for approximately two years. Prior to military service, affiant was employed as a deputy sheriff with the Whitfield County Sheriff's Office, Dalton, Georgia, for approximately eighteen months. In June, 1975, affiant received a Bachelor of Science Degree in Criminology from Florida State University, Tallahassee, Florida. Affiant has been certified by the Police Officers Standards and Training Council as a special agent, peace

officer and narcotics agent and has also received specialized training in the investigation of drug smuggling. As a special agent for the Georgia Bureau of Investigation, affiant has participated in and been responsible for the investigation and prosecution of numerous major violators of the Georgia Controlled Substance Act.

This affidavit seeks authorization to intercept, overhear, and record telephone communications for a twenty (20) day period concerning violations of the Georgia Controlled Substance Act in contravention of Georgia Code Title 16, Section 16-13-30 and 16-13-31 concerning the possession, manufacture, distribution of controlled substances and marijuana and trafficking in cocaine, methaqualone and marijuana, which have been and are being committed by Lawrence R. Duncan and his co-conspirators, accomplices, agents, suppliers, deliverers, and customers.

During a period of time from August 30, 1982 to the present, numerous law enforcement agencies, including Special Agent Brad Bonnell with the Georgia Bureau of Investigation, Special Agent Al Millard with the Federal Bureau of Investigation, and Investigator Paul Griffin of the District Attorney's Office for the Lookout Mountain Judicial Circuit, have participated in the investigation of a criminal organization involved in the acquisition and distribution of controlled substances and marijuana. Through the combined efforts of the above mentioned law enforcement agencies, the following individuals have been identified to the Affiant as principals in this organization: Lawrence R. Duncan, Denvil Ronald Daniel, William Condon Graham, and Charles Edward Fleming, Sr.

Information developed from this investigation by affiant, as well as through confidential sources hereinafter

set forth in this affidavit, indicates this is an on-going operation which has continued at least from August, 1982 until the present. Lawrence R. Duncan has been identified by confidential informants "A," "B," "C" and "D" as a major principal in this criminal endeavor and investigation by affiant discloses that he resides with Margaret Duncan at Star Route, Georgia Highway 301, atop what is known locally as Sand Mountain, Dade County, Trenton, Georgia, with telephone number (404) 657-6393, which is listed in the name of Margaret Duncan.
(Infra see attached Exhibit 1, incorporated herein by reference.)

Affiant Bonnell inquired, through the Georgia Bureau of Investigation Intelligence Unit, concerning all available data on Lawrence R. Duncan. Affiant Bonnell was subsequently provided with two criminal intelligence reports dated January 25, 1982 and August 16, 1982, which contain information, provided by an anonymous source, detailing the drug trafficking activities of Lawrence Duncan. Affiant also received a criminal intelligence report, prepared by Georgia Bureau of Investigation Special Agent Ron Rohlfs, dated December 22, 1980, which detailed the circumstances of an investigation concerning Charles Edward Fleming, Sr. of Savannah, Georgia. The Criminal intelligence report details a Federal Bureau of Investigation inquiry in which a Pen Register was placed on the telephone of Charles Edward Fleming, Sr., said being 912-925-1947. It is further noted that on Page 11 on the criminal intelligence report, prepared by Rohlfs, is information concerning an associate of Fleming's, identified as Lawrence Robert (Red) Duncan, who is described as as financier and a major distributor of drugs.

Affiant Bonnell was subsequently advised by Special Agent Ron Rohlfs that on September 30, 1982, search

warrants were executed on the residence of Constance Michelle Fleming Williams at 1010 Mohawk Street, Savannah, Georgia, and on the residence of Gail Arguett Fleming on 1030 Mohawk Street, Savannah, Georgia. Gail Fleming is the wife of Charles Edward Fleming, Sr., and Connie Fleming Williams is the daughter of Charles Edward Fleming, Sr. Agent Rohlfs advised that one ounce of cocaine was subsequently seized in the residence of Connie Fleming Williams and that a small quantity of marijuana was discovered in the residence of Gail Fleming, along with miscellaneous documents concerning drug trafficking which were seized and are currently being held as evidence in a pending RICO investigation.

Agent Rohlfs stated that in February, 1982, Charles Edward Fleming, Sr. was arrested in Miami, Florida, while in possession of approximately five kilos of cocaine. Rohlfs stated that because a co-defendant claimed possession of the cocaine, Fleming was not prosecuted, although he did plead guilty to a reduced charge of possession, stemming to three quaalude tablets found on his person.

Agent Rohlfs stated Fleming is currently incarcerated in Montgomery Correctional Institute, Montgomery, Alabama, where he is serving a twelve month sentence.

Agent Rohlfs advised that on March 17, 1982, Georgia Bureau of Investigation Special Agent John Edwards, while acting in a covert capacity, purchased one pound of cacaine from Emanuel Louis Fleming, the oldest son of Charles Edward Fleming, Sr. Agent Rohlfs stated that Charles E ward Fleming, Sr. fled the scene as officers apprehended his son. Agent Rohlfs advised Fleming has been indicted as a co-conspirator in the above related incident.

Agent Rohlfs advised that the Georgia Bureau of In-

vestigation arrest record for Emanuel Louis Fleming reflects that his telephone number is 912-927-4561. An analysis of the telephone calls charged to the instrument located in the residence occupied by Lawrence Duncan reflects two long distance telephone calls to the instrument listed to Emanuel Louis Fleming.

On or about September 1, 1982 Affiant David B. Bonnell was advised by Nebraska State Police Investigator William Schlachter, (Badge 260) that on August 30, 1982 officers of the Franklin County Sheriff's Department and the Nebraska State Patrol acting on information provided by an informant executed a search warrant on the residence of Denvil R. Daniel, in Naponee, Nebraska which subsequently resulted in the seizure of approximately seven hundred pounds of marijuana and the arrest of seven suspects, to include Cassie Marcella Daniel, wife of Denvil R. Daniel. Investigator Schlachter stated that Denvil R. Daniel eluded apprehension and is being sought as a fugitive from Nebraska.

Affiant Bonnell states that on October 21, 1982, a confidential and reliable informant hereinafter referred to in this Affidavit as informant "A", provided Affiant Bonnell with information which resulted in the arrest of Thurman Artis Porter and Glenda Evelyn Porter and the seizure of approximately one hundred and forty-one pounds of marijuana on October 21, 1982. The informant had further advised that he had been personally informed through conversation with Thurman Porter that the marijuana was part of a shipment of marijuana which had originated in Kansas and had been transported to Georgia under the supervision and direction of Denvil (Big Red) Daniel and Lawrence Duncan. Informant "A" further identified Law-

rence Duncan as the principal actor and primary investor in an on-going criminal enterprise of trafficking in marijuana, methaqualone, cocaine and other controlled substances. This confidential and reliable informant has been known to Affiant Bonnell for a period of time in excess of ninety days. This confidential and reliable informant has provided Affiant Bonnell, on numerous occasions, with information in regards to illegal activities; and on each and every occasion, this information has been substantiated by either Affiant Bonnell or by other law enforcement personnel. Informant has always provided true and correct information to Affiant Bonnell. Informant "A" advised the Affiant that in August 1981, he had accompanied Thurman Porter and Denvil Daniel to Nebraska for the purpose of harvesting domestically grown marijuana for transport by motor vehicle to Georgia. Informant "A" stated that during this trip to Nebraska he was informed by both Daniel and Porter that Lawrence Duncan was the principal investor in the marijuana smuggling operation in which they were engaged. Informant "A" also reported that he learned through conversation with Thurman Porter or through personal association that the following named persons are being frequently employed by Daniel and Duncan to assist in the harvesting, transporting and distributing of large quantities of domestically grown marijuana: Thurman Porter, Wendell Porter, Claudy (Donnie) Wooten, Bill Wooten, William (Little Bill) Bennett Hix, Allen Kessler, Kenneth Gass, and Dennis Walden. Informant "A" also stated that in early August 1982, he had been asked to again accompany Denvil Daniel to Nebraska for the purpose of assisting in the harvesting and importing of domestically cultivated marijuana. Informant "A" advised that Denvil Daniel per-

sonally requested the services of Informant "A" during the course of a private conversation between Informant "A" and Daniel.

Informant "A" further reported during his trip to Nebraska with Porter and Daniel he had personally observed that Denvil Daniel and his entourage of marijuana pickers would stop in Hayes Kansas while enroute to the community of Napponee, Nebraska, where the marijuana was to be harvested. An examination of telephone toll records from August 18, 1982 through December 15, 1982 for the instrument listed to Denvil Daniel, 404-657-6160, reveals two long distance calls made on September 27, 1982 and September 28, 1982 to Hayes, Kansas; and four long distance calls made on August 18, 1982; August 27, 1982; September 16, 1982; and September 19, 1982, to Napponee, Nebraska.

Affiant Bonnell states that on November 12, 1982, acting on information provided by confidential informant hereinafter referred to in this Affidavit as Informant "B", Affiant Bonnell arrested Wendell Porter (brother of Thurman Porter) and Claudy (Donnie) Wooten and seized approximately one hundred and forty pounds of marijuana in Catoosa County, Georgia. This informant is not the same individual who provided the information which resulted in the arrest of Thurman and Glenda Porter. This confidential and reliable informant has been known to Affiant Bonnell for a period of time in excess of ninety days. This confidential and reliable informant has provided Affiant Bonnell, on numerous occasions, with information in regards to illegal activities; and on each and every occasion, this information has been substantiated by either Affiant Bonnell or by other law enforcement personnel. This confidential and reliable informant has always provided

true and correct information to Affiant Bonnell. (The informants in this investigation are totally independent and unaware of each other.) Informant "B", who provided the information which led to the arrest of Wendell Porter and Claudy Wooten, further advised that he had been informed, by Wendell Porter, that the marijuana, which was seized in this particular incident, was part of a larger shipment which had been brought to Georgia from Kansas under the supervision of Denvil Ronald (Big Red) Daniel and Lawrence Duncan. Informant "B" stated that in May, 1981 he had accompanied Denvil Daniel to the community of Phillipsburg, Kansas, and had helped to harvest domestically grown marijuana, which was then transported by motor vehicle to Georgia. Informant "B" identified Lawrence Duncan as the principal investor and director of the marijuana smuggling operation. Informant "B" stated that although Duncan did not directly participate in the harvesting of the contraband, he did facilitate its subsequent distribution by making available his place of business for storage and packing, as well as notifying prospective buyers concerning the availability of the marijuana.

Subsequent to the arrest of Thurman Porter, which occurred on October 21, 1982, this informant "B" (who had provided information which led to the arrest of Wendell Porter and Donnie Wooten) introduced Thurman Porter to a covert Georgia Bureu of Investigation agent who was posing as a prospective buyer of large quantities of marijuana and/or methaqualone. Porter indicated, through a conversation with the covert agent, that he was in a position of being able to provide a large quantity of marijuana at some future date and further indicated he would have to coordinate his efforts to deliver the contraband with a group of associates whom he did not identify to the covert agent.

On January 31, 1983 Affiant Bonnell was advised by Trial Coordinator Johnny Robinson of the Jackson County Attorney's Office, Scottsboro, Alabama that on September 16, 1982, Denvil Ronald Daniel, Wendell Porter, C.L. Rains, and Kenneth Gass were apprehended while in possession of approximately five hundred pounds of marijuana while on property owned by Thurman Porter located in Jackson County, Alabama.

Affiant Bonnell has further determined, through independent investigation, that on December 16, 1982, Lawrence Duncan was admitted to the Downtown General Hospital, Chattanooga, Tennessee, where he was treated for gun shot wounds to the left thigh and left hand. Further inquiry revealed Duncan failed to report the incident to the Dade County Sheriff's Office, although he advised attending physicians that his home had been ransacked subsequent to his having been shot by two unidentified assailants, armed with pistols.

Investigator Paul Griffin, Lookout Mountain Judicial Circuit District Attorney's Office subsequently advised Affiant Bonnell that a confidential and reliable informant reported, to Investigator Griffin, that Lawrence Duncan had been shot as as result of having failed to pay for a shipment of domestically grown and harvested marijuana. Investigator Griffin further advised that the informant stated that this knowledge had come from direct personal contact with the participants in the incident involving the shooting of Lawrence Duncan. Investigator Griffin further reported that his confidential and reliable informant hereinafter referred to in this Affidavit as Informant "C" has advised Investigator Griffin that knowledge concerning the criminal activities of Daniel and Duncan has come from personal observation and conversation with Daniel and Duncan. These conversations, according to Informant

"C", have occurred over a period of the past six months. Investigator Griffin further advised that this informant was personally known to Investigator Griffin for a period of time in excess of five years and who has provided Investigator Griffin, on numerous occasions, with information in regards to criminal activities which was consistently substantiated by Investigator Griffin or by other law enforcement personnel. In addition to intelligence type information, this informant has, within the past five years, provided information to Investigator Griffin which resulted in the recovery of a stolen automobile in Dade County, Georgia. Investigator Griffin advised Affiant Bonnell that his informant has always provided true and correct information to Investigator Griffin.

On January 14, 1983, Affiant Bonnell was advised by Tennessee Bureau of Investigation Special Agent David Shelton that, during the course of an investigation into the suspected criminal activities of William Condon Graham, information had been received, from a confidential and reliable informant, concerning Graham's involvement with a Dade County resident, identified only as the Godfather. Shelton stated the informant reported having personally observed, on numerous occasions, the Godfather (described as a white male, approximately seventy (70) years of age) deliver, to Graham, large quantities of methaqualone in the form of quaalude tablets. Shelton stated that according to the above mentioned informant, the Godfather delivers the tablets in wooden crates which bear the writing, "Machine Parts". Contained in the crates are heat sealed plastic bags containing approximately thirty thousand quaalude tablets. Agent Shelton advised he had determined, during the course of his investigation, that William Condon Graham's business telephone is 615-775-0822, that Graham's home telephone number is

615-775-3291 and a second telephone located in the Graham residence is listed as 615-775-4647.

On February 15, 1983, Affiant Bonnell was provided with a photostatic copy of a Georgia State Intelligence Network report by the Special Investigation Division of the Cobb County Police Department concerning an incident which occurred on March 2, 1974 in which Lawrence R. Duncan was apprehended while in possession of a firearm and stolen property. The aforementioned intelligence report further details that Duncan was apprehended while in the company of one Fred Robert Gomez and Willie F. Waldie. The report also reflects that Duncan had, in his possession at the time of his arrest, $1,428. On February 15, 1983, a Pen Register device was activated by GBI Special Agent Tim Jones which would record only those telephone numbers dialed from the instrument located in the residence occupied by Lawrence Duncan which is listed in the name of Margaret Duncan as (404) 657-6393. This Pen Register was installed upon the issue of an Order of Authorization signed by Superior Court Judge Joseph Loggins.

On Thursday, February 24, 1983, Affiant Bonnell conducted a visual examination of the residence occupied by Lawrence Duncan and subsequently observed that a metal wire mesh fence had been erected around the visible portion of the Duncan residence. This fence is non decorative and has apparently been constructed for the purpose of fortification. Affiant Bonnell also observed, what appeared to be, metal anti-burglary type grate covers being installed on visible windows and doors.

Affiant Bonnell inquired through NCIC concerning the criminal history of Charles Fleming, Sr. It was subsequently determined that Fleming has an extensive criminal

history composed of murder, robbery, larceny, and drug violations.

Affiant Bonnell further inquired through the computerized file of the Southern Bell Telephone system, Chattanooga, Tennessee, concerning subscriber data for the telephone numbers extracted from the telephone toll records listed to the instrument located at the residence occupied by Lawrence Duncan. It was subsequently determined that telephone #615-877-1602 is listed to a Jim Garner of 131 Sunset Circle, Chattanooga, Tennessee. It was further determined that #615-821-2749 is listed to a Garland E. Smith at 3322 Roundabow Road, Chattanooga, Tennessee. Affiant Bonnell was subsequently advised by Chattanooga Police Department Narcotics Investigator Gary Lomenick that on June 22, 1982, James M. Garner was apprehended subsequent to the execution of a search warrant which resulted in the seizure of cocaine, LSD, marijuana, and approximately seven hundred quaalude tablets. Investigator Lomenick advised Garner listed his telephone number as 615-877-1602.

An analysis of the telephone tolls from the instrument located in the residence occupied by Lawrence Duncan reveals long distance calls made to Garner on June 22, 1982; July 10, 1982; August 9, 1982; August 22, 1982; and September 6, 1982.

An examination of the telephone tolls, charged to the instrument located in the residence occupied by Lawrence Duncan, reveals a total of twelve telephone calls placed from the Duncan residence to the telephone listed to Charles Edward Fleming, Sr. The telephone tolls further reflect long distance calls placed from the residence of Duncan to Charles Edward Fleming, Sr. on: June 27, 1982; July 5, 1982; July 23, 1982; August 5, 1982; August 6, 1982; August 11, 1982; two calls on August 18, 1982;

August 23, 1982; August 29, 1982; August 30, 1982; and December 1, 1982.

An analysis of telephone tolls charged to the instrument located in the residence occupied by Lawrence Duncan reveals calls made from the Duncan residence to the above listed telephone numbers of William Condon Graham in 1982 on the following dates: Two calls made July 1; September 1; September 5; September 7; September 11; September 13; two calls on September 17; September 19; two calls on October 5; two calls on October 6; two calls on October 15; two calls on October 24; November 30; December 1; two calls on December 18. Affiant Bonnell subsequently obtained William Condon Graham's criminal history report which reflects numerous narcotic law violations dating from 1960 to 1977.

Further examination of telephone toll records reveals from August 18, 1982 through December 15, 1982 a total of fifteen long distance telephone calls made from the instrument listed to Denvil Daniel (404-657-6160) to Phillipsburg, Kansas.

Affiant Bonnell was also advised by Investigator Lomenick that reliable criminal information has been received by the Chattanooga Police Department which reports that Garland E. Smith is a major drug trafficking violator who resides in Hamilton County. An analysis of the telephone toll records for the instrument located in the residence of Lawrence Duncan reveals a total of 41 telephone calls placed to the instrument listed in the name of Garland Smith, 615-821-2749, between the dates of June 23, 1982 and December 14, 1982. An analysis of the Pen Register tape, which is recording the telephone numbers dialed from the instrument located in the residence occupied by Lawrence Duncan, 404-657-6393, reflects a call placed to

the instrument listed to Garland Smith on February 23, 1983.

An analysis of the Penn Register printout tape, which is recording the numbers dialed from the instrument located in the residence of Lawrence Duncan at 404-657-6393, reflects that on February 22, 1983, approximately 7:38 p.m., telephone number 205-597-2856 is listed to Gerland Gass, Route 2, Box 153 Higdon, Alabama. It was further determined that Gerland Gass was apprehended on October 9, 1980 in DeKalb County, Alabama, while in possession of 10 grams of cocaine. Gass was subsequently charged with Violation of the Alabama Uniform Controlled Substances Act.

It should be noted that the individual, described as the Godfather, approximates the description of Lawrence Duncan, white male, approximately 70 years of age, white hair, resident of Sand Mountain, Dade County, Georgia. It is further noted that, prior to the activation of this investigation, Affiant Bonnell had, on two occasions, been informed by independent sources that Lawrence Duncan frequently utilized the code name of Godfather while in pursuit of illegal activities.

Affiant Bonnell was assigned to the Georgia Bureau of Investigation Special Coastal Area Narcotics (SCAN) unit from September 15, 1980 until May 15, and during that time became personally knowledgeable of the drug smuggling activities of Charles Edward Fleming, Sr. through participation in investigations during which information was received or developed concerning Charles Edward Fleming, Sr.'s involvement in the illegal trafficking of cocaine.

Affiant Bonnell was also provided, by the Georgia Bureau of Investigation Intelligence Unit, with a pho-

tostatic copy of Lawrence Duncan's criminal history which reflects an extensive criminal career, composed of such criminal activities as robbery and motor vehicle theft.

Affiant has been advised within the past 5 days by a confidential informant hereinafter referred to in this Affidavit as Informant "D" that Gerland Gass is a major illegal drug trafficker and that Gass is currently able to provide, for sale, cocaine by the pound quantity and methaqualone tablets by the thousand count lot. This informant further reported, that he is a consumer of controlled substances and that he has personally purchased controlled substances from Gerland "Jug" Gass on several occasions. Affiant was subsequently advised, by Federal Bureau of Investigation Al Millard, that the above mentioned confidential informant has provided information in the past which led to the seizure of a large quantity of marijuana and the felony arrest of several suspects. Informant "D" reported that Lawrence Duncan, is often referred to as the "Godfather". Informant "D" also stated that he had been informed on March 4, 1982 by Gerland Gass that Lawrence Duncan provided Gass with cocaine.

From the information concerning the telephone numbers of documented drug violators and the analysis of the telephone toll records for the instrument located in the residence occupied by Lawrence Duncan combined with the frequency and persons contacted from telephone 404-657-6393 indicates that this particular phone is being utilized by Lawrence R. Duncan to further his criminal endeavors in the area of illegal drug trafficking.

Further, considering all the said circumstances, Affiant has probable cause to believe tht the said Lawrence Duncan is committing the crimes of Importation and Sale of Marijuana or Controlled Substances in violation of the penal laws of Georgia.

Affiant also has probable cause to believe that the following type of communication sought to be intercepted will be engaged in by the aforesaid persons to wit: Discussions concerning said offense, including but not limited to the transportation, receipt, purchase and storage of marijuana and other controlled substances; the retail and wholesale price of marijuana and other controlled substances to be purchased, sold or transferred; potential distributors or purchasers of marijuana and other controlled substances; the identities of other conspirators and accomplices engaged in the illegal traffic of marijuana and other controlled substances; and the activities of law enforcement agencies charged with investigating said offense.

Affiant makes this Affidavit for the information of David L. Lomenick, District Attorney of the Lookout Mountain Judicial Circuit, to be annexed as an Exhibit to his Application for Investigation Warrant to intercept, overhear and record conversations between Lawrence R. Duncan, William Condon Graham, James Garner, Emanuel Louis Fleming, and Gail Fleming and other unknown persons because: Other invetigative procedures have been tried and failed and because of the secrecy with which said persons conduct such unlawful enterprises; other investigative procedures reasonably appear to be unlikely to succeed; nor have informants, in his case, identified everyone involved in the operation. Lawrence Duncan has, in the past, been arrested for a multitude of various violations and is aware of techniques used by law enforcement officers in conducting covert investigations. Furthermore, Affiant Bonnell concludes, from the sources already mentioned and from reports of local police agencies that have stated that his operation has been in existence for quite some time, and the local police authorities have been un-

able to obtain evidence to develop a prosecutable case in regards to this drug trafficking organization.

It should also be noted that neither Informant "A", "B", "C" nor "D" will provide evidence in any prosecution arising from the investigation. Informants "A", "B", "C" and "D" have specifically stated that they fear Lawrence Duncan and believe that any overt participation on their part in the prosecution of Lawrence Duncan would result in their suffering physical harm or death in order to terminate their participation or to seek retribution. The electronic surveillance is, therefore, necessary in order to investigate fully and completely this drug trafficking operation and to determine the exact status of each participant. The drug trafficking enterprise involves many individuals with different status and in order to identify these participants and their status the electronic surveillence is necessary. Affiant Bonnell states from these facts and from previous experiences, the only way to investigate fully and completely an illegal drug trafficking enterprise is through the issuance of an investigation warrant (electronic surveillance). Affiant Bonnell states the following equipment and devices will be used in the monitoring and recording of the above listed telephone numbers: A reel-to-reel tape recorder and a dialed number recorder on the telephone. This surveillance will be activated and begin monitoring whenever the telephone headsets at these numbers are removed from their cradles and to cease monitoring when a telephone headset is returned to the cradle. The Affiant Bonnell requests the electronic surveillance be for a period of twenty days. The nature of this investigation is such that the authorization should not automatically terminate when the above described communication has been first obtained. This is due to the fact that additional time is necessary to identify as many, if not all, participants involv-

ed in this drug trafficking operation. Because this is a continuing course of illegal conduct which has been operating over a long period of time and in which telephone communications are a primary method of carrying on this illegal conduct, there is absolutely no reason to suspect this drug trafficking operation to cease in the short time between the initial overhearing and recording of these conversations. Likewise, communications are likely to continue, as in the past, between Lawrence R. Duncan, William Condon Graham, and other unknown customers. It is reasonable to expect that several communications will need to be overheard and recorded in order to identify as many of the people in this drug trafficking organization as possible. The surveillance should also be continued to learn the identity of those persons who are providing controlled substances, as well as those who are facilitating a delivery of controlled substances. Because of these circumstances or exigencies, which overcome and override the need for giving notice of the surveillance to the parties to be overheard and recorded by the devices set out, if notice were given this drug trafficking operation would cease and the goals of this criminal investigation would not be accomplished. Affiant Bonnell states that said warrant, if issued, would be executed as soon as practicable; shall be conducted in a way to minimize the interception of communications not subject to interception; will terminate upon obtainment of the objectives stated above and not exceed twenty days unless renewed as so authorized by this court.

Affiant Bonnell has verified the above telephone number, 404-657-6393, is listed to Margaret Duncan, Star Route, Trenton, Georgia, the wife of Lawrence R. Duncan. This verification has been made with the Trenton Telephone Company through physical surveillance. Affiant

Bonnell requests that the Trenton Telephone Company, Trenton, Georgia, furnish the Affiant and investigating officers with the technical information necessary to complete this electronic surviellance. Stated in the foregoing affidavit, normal investigative procedures have been tried and failed; and therefore, this electronic surveillance is necessary to develop the evidence for a prosecutable case and to determine the entirety of this operation. This foregoing application for authorization for an investigative warrant is true and correct to the best of my knowledge and belief.

/s/ David B. Bonnell
David B. Bonnell, Affiant, Special Agent
Georgia Bureau of Investigation

Sworn to and subscribed
before me this 10th day of
March, 1983

/s/ Paul M. Painter
Judge, Superior Court
Lookout Mountain Judicial Circuit

APPENDIX "L"

SEARCH WARRANT

MUNICIPAL COURT OF SAVANNAH

GEORGIA, CHATHAM COUNTY

To the Sheriff of the Municipal Court of Savannah and his lawful Deputies, all and singular the Sheriffs of this State and then lawful Deputies, lawful Constables of this State, the officers of the Chatham County Police Department, the Officers of the Police Department of the City of Savannah, the State Patrol, and all other law enforcement officers and agents authorized to serve search warrants. Greeting:

Whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the foregoing affidavit in order to obtain a warrant to search the person of LAWRENCE R. "RED" DUNCAN, MARGARET JENNIE GASS, RICHARD VANNICE, DAVE VANNICE AND PAMELA LONG and the premises known as (vehicle) A 1979 LINCOLN, BLUE IN COLOR, BEARING GEORGIA LICENSE PLATE: YDE 427 WITH A DADE COUNTY STICKER. THIS VEHICLE BEARS VIN: F9Y82S761587. SAID VEHICLE NOW LOCATED IN THE PARKING AREA OF A K-MART STORE LOCATED NEAR THE INTERSECTION OF ABERCORN AND MONTGOMERY CROSSROADS, SAVANNAH, GEORGIA.

Chatham County, Georgia

for the possession (sale) of
MARIJUANA, METHAQUALONE, COCAINE AND OTHER CONTROLLED SUBSTANCES

in violation of the laws of Georgia: and whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the forgoing affidavit(s) in support of the affidavit of GBI SPECIAL AGENT BRAD BONNELL

It is the finding of the undersigned, and it is hereby so found and held, that probable cause has been shown under oath and in writing for the undersigned to believe that the property so described is being concealed on the person and premises (in the vehicle) above described, and that the foregoing grounds for application for issuance of a search warrant have been established.

Therefore, you are hereby commanded to search forthwith the person named and premises (vehicles) described for the property specified, and to make such search in the day time (at any time in the day or night). If you find said described property, or any part thereof, in the execution of this warrant, seize the same, together with any discovered item, substance, object, thing, or matter whose possession is unlawful under the laws of Georgia or which is tangible evidence of the commission of a crime, and which may be seized under existing law. Leave with defendant a copy of this warrant and a receipt for the property taken, prepare an inventory of such seized property, and return this warrant to me within ten days from this date, as required by law.

This 27th day of March, 1982, at 3:40 o'clock M.

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah

AFFIDAVIT FOR SEARCH WARRANT
MUNICIPAL COURT OF SAVANNAH

GEORGIA, CHATHAM COUNTY

Personally appeared before the undersigned judicial officer authorized by the laws of Georgia to issue search warrants the subscriber hereto, who being duly sworn, deposes and says as follows in support of the affidavit of GBI SA BRAD BONNELL to obtain a warrant to search the person of LAWRENCE R. DUNCAN, MARGARET JENNIE GASS, RICHARD VANNICE, DAVE VANNICE, AND PAMELA LONG and the premises known as (vehicle) A 1979, LINCOLN, BLUE IN COLOR, BEARING GEORGIA LICENSE PLATE YDF 427 WITH A DADE COUNTY STICKER. THIS VEHICLE BEARS VIN: F9Y82S761587.

Chatham County, Georgia

for the possession (sale) of MARIJUANA, COCAINE, METHAQUALONE AND OTHER CONTROLLED SUBSTANCES in violation of the Laws of Georgia. On March 10, 1983, a wire tap was activated on telephone number (404) 657-6393 under the authority of an Investigative Warrant issued by Superior Court Judge Paul Painter. The above listed telephone numberis listed to Margaret Duncan and is located in the residence occupied by Lawrence Duncan. During the course of this investigation it was determined that Lawrence Duncan was contacted by an unidentified male subject who advised that he had Lawrence Duncan's order prepared and that Duncan should proceed to Savannah, Georgia on Saturday, March 26, 1983 to pick up his order. Conversation between Lawrence Duncan and this unidentified male subject consisted

of secretive and coded language for the apparent purpose of concealing the significant content of their discussion. Such terms as "Fifty Calendars, Special Smoking Tobacco and LSD" were used to describe the items available for Lawrence Duncan. On Friday, March 25, 1983, Affiant personally observed Lawrence Duncan depart from the community of Trenton, Georgia and travel to Savannah, Georgia. Duncan was observed by investigating officers to make contact with the individuals subsequently identified as Richard Vannice, Dave Vannice and Pamela Long who were operating a Cadillac which is also believed to be owned by Duncan. Duncan was observed making contact with an as yet unidentified male subject at a residence located on or near Montgomery Crossroads, Savannah, Ga. Investigating officers participating in the surveillance of this meeting observed a young white male subject transfer an item described as a small package from Duncan's vehicle which is described above as a Lincoln sedan into the residence of the unidentified male. On Sunday, March 27, 1983, investigating officers observed Lawrence Duncan operating the above described green in color Cadillac automobile, return to the residence of the unidentified male subject which is located on or about Montgomery Crossroads, Savannah, Ga. GBI Agent Ed Hope subsequently observed a young white male subject transfer a package measuring the approximate dimensions of a shoe box from the residence of the unidentified male located on or about Montgomery Crossroads, Savannah, Ga. into the Cadillac. The package was placed into the vehicle in such a way as to indicate that it was being concealed. Investigating officers subsequently apprehended the above listed suspects and seized the vehicles described above. Investigating officers subsequently observed in plain view on

the front seat of the Cadillac a quantity of suspected marijuana and cigarette rolling papers.

/s/ Brad Bonnell
Deponent

Sworn to and subscribed before me this 27th day of March, 1983

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah

CERTIFICATION OF WARRANTS

I, _____, Deputy Clerk of the Muncipal Court of Savannah, do hereby certify that this is a true and correct copy of the within warrant on file in this office.

/s/ _____
Deputy Clerk, Municipal Court of Savannah
Date: 3/29/83

VICTOR H. MULLING

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-1068 and 86-1081

In The

Supreme Court of the United States

October Term, 1986

LAWRENCE DUNCAN AND
MARGARET DUNCAN,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG AND
DAVID WAYNE VAN NICE,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

CONSOLIDATED BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether Petitioners have failed to present the standing question in the federal statutory context under 18 U.S.C. § 2518 to the Court of Appeals of Georgia for its review.

2.

Whether the Court of Appeals of the State of Georgia properly concluded that Petitioners lacked standing to challenge the validity of the wiretap warrant as the alleged illegality related to an entity not a party to the instant proceedings.

3.

Whether there was no due process violation sufficient to justify the exclusion of any evidence in the instant action.

4.

Whether the Court of Appeals of Georgia properly concluded that there was no violation of either the federal or state wiretap laws by the making of a duplicate tape at the time of the wiretap when the reel-to-reel original tapes were kept and returned to the court under proper procedures.

5.

Whether the Court of Appeals of Georgia properly concluded that all requirements of the state and federal wiretap statutes were complied with in relation to obtaining the warrant for the wiretap.

6.

Whether the state court properly concluded that the searches of the two automobiles in question were supported by probable cause.

7.

Whether the Court of Appeals of Georgia properly declined to find any constitutional violation based upon the arrest and search of Petitioner Long.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS FAILED TO TIMELY RAISE AN ASSERTION THAT THEY HAD STANDING UNDER 18 U.S.C. § 2518 TO CHALLENGE THE ALLEGED ILLEGALITY OF THE SUBPOENAS 3

II. ALL PETITIONERS LACK STANDING TO CHALLENGE THE VALIDITY OF THE SUBPOENAS FOR THE TELEPHONE TOLL RECORDS 4

III. PETITIONERS HAVE ESTABLISHED NO DUE PROCESS VIOLATION BY THE UTILIZATON OF THE SUBPOENAS IN QUESTION 7

IV. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND NO VIOLATION OF EITHER THE STATE OR THE FEDERAL WIRETAP STATUTE BY THE UTILIZATION OF DUPLICATE CASSETTE TAPES 8

V. PETITIONERS HAVE SHOWN NO VIOLATION OF THE FEDERAL WIRETAP STATUTE IN THE OBTAINING OF THE WARRANT FOR THE WIRETAP WHICH WOULD JUSTIFY THE SUPPRESSION OF ANY SUBSEQUENTLY OBTAINED EVIDENCE 9

VI. THERE WAS SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE GRANTING OF SEARCH WARRANTS FOR THE TWO AUTOMOBILES IN QUESTION 14

VII. THE SEARCH OF PAMELA JEAN LONG WAS JUSTIFIED AS A SEARCH INCIDENT TO ARREST 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES CITED:

Beck v. Washington, 369 U.S. 541 (1962) 3

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Franks v. Delaware, 438 U.S. 154 (1978) 12

Herndon v. Georgia, 295 U.S. 441 (1935) 4

Illinois v. Gates, 462 U.S. 213 (1983) 16

Radio Station WOW, Inc. v. Johnson, 326 U.S. 102 (1945) 4

United States v. Leon, — U.S. —, 104 S.Ct. 3405 (1984) 16

United States v. Miller, 425 U.S. 435 (1976) 4, 6, 7

United States v. Payner, 447 U.S. 727 (1980) 7

United States v. Russell, 411 U.S. 423 (1974) 8

Van Nice v. State, 180 Ga. App. 112, 348 S.E.2d 515 (1986) 2, 5, 15

Wireman v. State, 163 Ga. App. 439, 295 S.E.2d 530 (1982) 18

STATUTES CITED:

18 U.S.C. § 2518 ..... 3, 8, 14

O.C.G.A. § 16-11-67 3

O.C.GA. § 17-5-30 ..... 3, 6

Nos. 86-1068 and 86-1081

In The

Supreme Court of the United States

October Term, 1986

LAWRENCE DUNCAN AND
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PART ONE

STATEMENT OF THE CASE

On March 10, 1983, an investigation warrant was issued for electronic surveillance to be conducted on a telephone at the residence of Lawrence Duncan in Dade County, Georgia. Said telephone was listed in the name of Margaret Duncan. Based on information obtained during

the electronic surveillance, physical surveillance began of the various Petitioners on Friday, March 25, 1983. Said surveillance began in Dade County, Georgia and continued to Savannah, Georgia on a Lincoln automobile. That automobile subsequently rendezvoused with a Cadillac in Savannah. The surveillance continued until the detention of both vehicles in a parking lot in Savannah on March 27, 1983. At that time all Petitioners in the instant action were arrested. Search warrants were obtained for both vehicles and for a house which had been frequented by some of the occupants of the vehicles during the previous few days.

Petitioners were subsequently indicted in the Superior Court of Chatham County on various charges relating to violations of the Georgia Controlled Substances Act. Motions to suppress were filed on behalf of the Petitioners challenging both the wiretap and the search of the automobiles. On September 13, 1985, the trial court denied the motions to suppress.

The Petitioners then filed an appeal from the denial of the motions to suppress in the Court of Appeals of Georgia. In a consolidated opinion from the interlocutory appeal, the Court of Appeals of Georgia affirmed the trial court's denial of the motions to suppress. *Van Nice v. State*, 180 Ga. App. 112, 348 S.E.2d 515 (1986). The Supreme Court of Georgia subsequently denied petitions for writs of certiorari on October 9, 1986. The instant petitions have been filed challenging the decision by the Court of Appeals of Georgia.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS FAILED TO TIMELY RAISE AN ASSERTION THAT THEY HAD STANDING UNDER 18 U.S.C. § 2518 TO CHALLENGE THE ALLEGED ILLEGALITY OF THE SUBPOENAS.

Petitioners' initial argument relates to an allegation that alleged illegal subpoenas were issued for the production of certain telephone toll records. Petitioners also assert that these telephone toll records served as a basis for the subsequent affidavit and application for the wiretap. Thus, Petitioners assert that the wiretap was illegal.

In the original briefs filed in the Court of Appeals of Georgia, the Petitioners raised this allegation under the Fourth Amendment to the United States Constitution and asserted this allegation under the Georgia wiretap statute. *See* O.C.G.A. § 16-11-67. Petitioners did not mention the federal wiretap statute in relation to this allegation. The Court of Appeals of Georgia resolved the issues based solely upon the Fourth Amendment to the United States Constitution and O.C.G.A. § 17-5-30 and O.C.G.A. § 16-11-67. The court did not refer to the federal wiretap statute in its decision on standing. Petitioners did not raise this statutory concept until after the Court of Appeals of Georgia had rendered its original opinion.

This Court has long recognized that a proper and timely presentation of a federal question in the state court is a jurisdictional prerequisite to review by this Court. *Beck v. Washington*, 369 U.S. 541, 550-4 (1962). Raising

an issue for the first time in a petition for rehearing in the state court is generally insufficient unless the state court actually entertained the petition and decided the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 102 (1945); *Herndon v. Georgia*, 295 U.S. 441 (1935). As Petitioners failed to present the federal statutory question to the state court in a timely fashion, certiorari should be denied on this basis. *See also Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. ALL PETITIONERS LACK STANDING TO CHALLENGE THE VALIDITY OF THE SUBPOENAS FOR THE TELEPHONE TOLL RECORDS.

The Court of Appeals of Georgia properly concluded that the Petitioners lacked standing to challenge the validity of the subpoenas for the telephone toll records. Petitioners have asserted that the subpoenas were invalid as there was no proceeding pending in any court at the time of the issuance of the subpoenas. Respondent asserts that the Court of Appeals of Georgia properly declined to confer standing upon any of the Petitioners.

In *United States v. Miller*, 425 U.S. 435 (1976), this Court recognized that there was no protectable Fourth Amendment interest in certain bank records which had been subpoenaed. In that case, the grand jury subpoenas were issued in blank by the clerk requiring an appearance and a production of the records on a date certain. The bank records were obtained and subsequently used in the investigation. This Court held that there was no intrusion into any area in which the defendant had a protected Fourth Amendment interest and concluded that there was

no legitimate expectation of privacy in the contents of those documents. *Id.* at 440. The Court also noted that a subpoena was not subject to the same strict requirements as search warrants. *Id.* at 440 n.8. Furthermore, in a footnote, the Court noted that the banks did not contest the validity of the subpoenas, implying that only the banks would have standing to challenge the subpoenas. *Id.* at n.9.

In the instant case, Petitioners are challenging the seizure of certain telephone toll records for the telephone in the name of Margaret Duncan. These records belong to the telephone company and are not individual records of any of the Petitioners. In relation to Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia properly concluded that these Petitioners were not aggrieved by the wiretap itself, noting that to be aggrieved "the violation must have occurred on the movants' premises or the unlawfully heard conversation must have been of the movants themselves in order to suppress the evidence." *Van Nice v. State, supra.* As noted by the court, neither was the case as it applied to Petitioners Long, Delvin and David Van Nice. Thus, clearly none of these Petitioners have standing to challenge the wiretap itself, much less the subpoenas from the toll records.

The Court of Appeals of Georgia noted properly that the Duncans would have general standing to attack the legality of the wiretap as it was on their telephone, but properly concluded that the Duncans lacked standing to assert that any illegality in the wiretap was due to the manner in which the telephone toll records were obtained. That court properly concluded that the telephone toll rec-

ords were not owned by the individual Petitioners and that there was no privacy right violated by the obtaining of these records. Thus, the court properly concluded that there was no standing under the federal constitution to challenge the procedure by which these telephone toll records were obtained. Respondent submits that this is a correct holding under the principles of *United States v. Miller, supra.*

The court also concluded that Petitioners Duncan did not have a basis for a claim under O.C.G.A. § 17-5-30 as they were not "aggrieved" by the seizure of the toll records and the records belonged to the telephone company. Respondent submits that the Court of Appeals of Georgia correctly applied the principles of law set forth by this Court in determining that Petitioners Duncan lacked standing in regard to the Fourth Amendment issue.

Finally, even though the issue was not timely raised, Respondent also asserts that Petitioners lack standing to challenge the validity of the subpoena even under the federal wiretap statute. Petitioners were not aggrieved by the subpoenas and the records obtained did not belong to the Petitioners but belonged to the telephone company. The only person actually having the authority to challenge the validity of the subpoenas would be the telephone company itself. In fact, certain similar information was also obtained through a pen register device and the information in question could also have been obtained through a pen register device. Thus, Respondent asserts that this allegation simply fails to state a constitutional question for review by this Court.

III. PETITIONERS HAVE ESTABLISHED NO DUE PROCESS VIOLATION BY THE UTILIZATION OF THE SUBPOENAS IN QUESTION.

Petitioners next assert that the alleged illegal subpoenas constituted a sufficient violation of the due process clause to require the granting of relief. Respondent submits that Petitioner has failed to show any government action which would justify the finding of a due process violation.

In *United States v. Payner*, 447 U.S. 727 (1980), this Court noted that a petitioner's Fourth Amendment rights were violated only when the challenged conduct invaded his own legitimate expectation of privacy rather than that of a third party. Thus, the Court found a lack of standing under the facts of that case. The Court also cited to *United States v. Miller*, noting that the depositor in *Miller* had no expectation of privacy in copies of checks and deposit slips on record with the bank. In *United States v. Payner*, the Court did not condone the conduct, but noted that even the conduct in that case did not command exclusion in every case of probative but tainted evidence. The Court emphasized the costly toll on the ability of the courts to ascertain the truth in criminal cases. The Court further noted in a footnote, that the same reasoning would apply to a due process claim and that such would arise only when there was some violation of a protected right of a particular defendant in question.

Respondent submits that there was no due process violation shown in the instant case as Petitioners have failed to show that any subpoenas violated any of their

protected constitutional rights. Further, Petitioners have failed to show that there was any action which was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 432 (1974). Thus this allegation fails to state a constitutional issue for review by this Court.

IV. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND NO VIOLATION OF EITHER THE STATE OF THE FEDERAL WIRETAP STATUTE BY THE UTILIZATION OF DUPLICATE CASSETTE TAPES.

Petitioners have asserted that 18 U.S.C. § 2518(8)(a) was violated by law enforcement officers making duplicate tapes from the original wiretap. Respondent submits that the Court of Appeals of Georgia properly found no constitutional violation in this regard.

The tapes in question were cassette tapes which were made at the same time that the original reel-to-reel tapes were made during the wiretap monitoring. The cassette recorder was activated manually and substantive conversations were taped to allow the officers to have a work tape with which to supplement their logs without having to utilize the original tapes. There is no question that the original reel-to-reel tapes were protected and preserved as required under the state and federal wiretap statutes.

The Court of Appeals of Georgia correctly concluded that the federal wiretap statute anticipates the making of such partial or duplicate tapes and does not require judicial approval for such duplication. In fact, 18 U.S.C. § 2518

(8)(a) states in part, "duplicate records may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations." Similarly, Georgia law also does not prohibit the making of duplicate records. As noted by the Court of Appeals of Georgia the original tapes were kept and returned to the court and they were properly preserved. The cassette tapes were utilized in maintaining the surveillance log and in taking notes. The tapes were secured by the G.B.I. agent, who also had the cassette tapes in his possession at the time of the hearing on the motions to suppress. No showing has been made of any taint to either the cassette tapes or the originals nor has there been any showing of any improper publication of any of the tapes. Thus, Respondent submits that there has been no violation of the federal wiretape statute.

V. PETITIONERS HAVE SHOWN NO VIOLATION OF THE FEDERAL WIRETAP STATUTE IN THE OBTAINING OF THE WARRANT FOR THE WIRETAP WHICH WOULD JUSTIFY THE SUPPRESSION OF ANY SUBSEQUENTLY OBTAINED EVIDENCE.

Petitioners assert that probable cause was not set forth on the face of the affidavit or in the application for the warrant for the wiretap. In the petitions before this Court, the Petitioners assert certain alleged inaccuracies in the original affidavit for the warrant for the wiretap as a basis for this allegation. Petitioners have also asserted that the application failed to contain any facts showing the inadequacy of alternative investigative procedures and assert that no showing was made why the authorization should not have terminated earlier. Petitioners also assert that there

were reckless or intentional assertions which were false in the affidavit and the application. Respondent asserts that Petitioners have failed to set forth a sufficient basis for a finding that the Court of Appeals of Georgia misapplied federal law.

Respondent initially submits that it is clear there was probable cause for the judge to issue the warrant for the wiretap. Furthermore, even though it later turned out that certain immaterial facts were not correct in the original affidavit, there has been no showing that there was an intentional or reckless statement of facts.

The affidavit submitted contained information showing that Lawrence Duncan and his associates had long been involved in activities relating to the distribution of narcotics. The heavy use of the telephone between Duncan and these inviduals would lead a reasonable person to believe that the telephone was being used to facilitate the distribution of narcotics. The investigation warrant was specific in that it authorized the interception of conversations related to these activities.

As to the alleged inaccuracies in the affidavit, the testimony at the motion to suppress hearing clearly substantiates the fact that the affiant, G.B.I. agent Bonnell, believed the information to be true at the time he presented the affidavit. Furthermore, the inaccuracies were not such as to conclude that probable cause has not been shown. The information showed that even though the affidavit stated that Charles Edward Fleming had been arrested in the possession of five kilograms of cocaine, Agent Bonnell subsequently learned that it was only three kilograms of cocaine. The affidavit also reflected that an agent had

purchased one pound of cocaine from Emanuel Fleming who was stated in the affidavit to be the oldest son of Charles Edward Fleming, Sr.; however, it was later learned that Fleming had a son older than Emanuel Fleming. Further, Agent Bonnell in his affidavit stated that the elder Fleming had been indicted in the above incident and testified at the hearing that he believed that that was the information relayed to him. It was later learned, however, that Mr. Fleming had not been indicted at the time of the affidavit, although he was being considered for indictment. The affidavit also stated that certain drugs were found in the residence of Connie Fleming Williams, when in fact the drugs were found outside of the dwelling but on her property.

The further alleged inaccuracy concerns a statement relayed by investigator Griffin to Agent Bonnell. Agent Bonnell in his affidavit stated that he had been advised that the information concerning the shooting of Florence Duncan came from persons directly involved with participants in the shooting; however, investigator Griffin indicated that his information came from persons directly involved in the drug deal related to the shooting, but not directly involved in the shooting itself.

Agent Bonnell specifically testified that he made no intentional misstatements and that he believed all the information that he stated in the affidavit was true at the time that he gave the information to the court. Thus, Petitioners have failed to show any intentional or reckless falsehood as Agent Bonnell fully believed all the information to be true at the time he made the affidavit and as it has also been shown that none of the inaccuracies were such as

to reflect on the materiality of the facts set forth in the affidavit. *See Franks v. Delaware,* 438 U.S. 154, 178 (1978).

The Petitioners further assert that two of the persons listed in the affidavit as persons involved with the Duncans had been dead for several years at the time of the making of the affidavit. Again, even though this subsequently turned out to be true, Agent Bonnell testified at the hearing on the motions to suppress that he did not know that to be a fact at the time of the making of the affidavit and, in fact, had no basis for such knowledge. He was presenting the trial court with as much information as he could on the background of the Duncans and reasonably relied on the information provided to him. Thus, again, there has been no showing of intentional or reckless falsehood in relation to this information.

Petitioners also assert that there was no showing as to the unavailability of alternative investigative measures. Respondent submits that the affidavit does establish that alternative investigative procedures would not be successful. Agent Bonnell in his affidavit noted the secrecy involved in the operation and the fact that the informants had not identified everyone involved. There was also information that Duncan had been arrested for a multitude of violations and was aware of the techniques used in covert investigations. The police had failed to make a case even though the operation had been in existence for a long period of time. The informants would not testify at any court proceeding due to fear of physical harm or death. Furthermore, the agent displayed photographs of the residence to the issuing judge showing the isolated nature of the locale and also showing the fence placed around the resi-

dence as well as the gate on the fence and bars placed on the windows.

The testimony presented at the motion to suppress hearing amply supported the information contained in the affidavit. It was established that the location in question, Sand Mountain, was a close knit community and that any attempts to make an intrusion therein would be noticed and reported to the Duncans. The officers reiterated the fact that there was no way to reasonably approach the residence without being observed and also noted the fence around the residence. Respondent submits that all of this information was clearly sufficient to show to the issuing court that other investigative procedures not only would be futile, but had been futile in the past. Thus, Petitioners have failed to show a violation of the federal wiretap statute.

Petitioners finally assert that a sufficient showing was not made to authorize a 20 day wiretap. Respondent submits that a sufficient showing was made. The affiant and the district attorney stated that time was needed to obtain information on as many participants involved in the drug organization as possible, noting that it was a continuing course of illegal conduct and that the identity of those persons providing the controlled substances and those facilitating delivery needed to be obtained. (Supplemental record 1, 15-16; 20, 25). Based upon the nature of the crimes in question and the information provided to the judge that this was an ongoing criminal enterprise, it is clear that sufficient justification was presented to allow the court to authorize a wiretap for 20 days.

Based upon all of the above, Respondent submits that Petitioners have simply failed to show any violations of 18 U.S.C. § 2518; therefore, no federal questions are presented for review of this Court. Thus, Petitioners have shown no basis for the granting of certiorari.

VI. THERE WAS SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE GRANTING OF SEARCH WARRANTS FOR THE TWO AUTOMOBILES IN QUESTION.

Petitioners have asserted that there was not sufficient probable cause to justify the search warrants for the Lincoln and Cadillac automobiles. Respondent submits that Petitioners have shown no constitutional violation in this regard.

Petitioners Duncan challenge the search of their Lincoln automobile, while Petitioners David and Delvin Van Nice and Petitioner Long challenge the search of the Cadillac automobile. Respondent asserts that probable cause was shown and the search warrants were properly issued to search both automobiles.

In relation to the search of the Cadillac automobile and the challenge of Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia noted the following:

> The affidavit in support of the warrant discussed the phone conversation in which Mr. Duncan was instructed to go to Savannah to pick up his order, the following of Duncan to Savannah, investigators' observation of various contacts and interactions between Duncan and the Van Nices, and the use of the Cadillac by Mr. Duncan and Delvin Van Nice to go to the private residence. Included also was information that a GBI

> agent had observed a package transferred from the private residence to the Cadillac where it was placed in the vehicle "in such a way as to indicate that it was being concealed." Noted, too, was that suspected marijuana was observed on the car's front seat in plain view as were cigarette rolling papers, "item[s] of paraphernalia utilized in the consumption of controlled substances."

Van Nice v. State, supra. The Court of Appeals found that the affidavit "provided a substantial basis for concluding the auto contained evidence of wrongdoing." *Id.* The court went on to conclude that the fact that the affidavit had recited the G.B.I. agent observed a package being transferred from the residence to the automobile, whereas the later statement by the agent was equivocal as to whether the transfer actually was from the house to the automobile or from the automobile to the house, would not be fatal to the warrant. The court concluded that this was simply a minor factual inaccuracy which would not undermine the probable cause shown. The court did not specifically find that the Van Nices and the Longs both had standing to contest the auto search, but simply assumed that they did. Clearly, should the search be found to be invalid, a further question would be presented as to the standing of all parties involved.

As to the search of the Lincoln automobile in relation to the Duncans, the Court of Appeals of Georgia simply found this allegation to be without merit. The record establishes, as do the affidavits in support of the warrants, that transfers were made between both vehicles in question and the house on Montgomery Crossroads. Once again, Respondent asserts that a simple review of the affidavit

shows that there was sufficient probable cause set forth to justify the issuance of a search warrant.

As noted by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983), a grudging attitude toward search warrants would be inconsistent with the Fourth Amendment principles. "So long as the magistrate had a 'substantial basis for . . . concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.'" *Id.* Clearly, in the instant case the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing based upon the facts presented in the affidavits. Respondent further submits that the police officers in question clearly acted in good faith reliance on the search warrants issued. In such circumstances, there is a strong preference for warrants; thus, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *United States v. Leon*, — U.S. —, 104 S.Ct. 3405, 3417 (1984). Of course, this does not preclude inquiry into the knowing or reckless falsity of the affidavit. It has not been shown in the instant case, however, that there was any knowing falsity presented in any of the affidavits or that there was any reckless presentation of false information. Finally, Respondent submits that as required by *Illinois v. Gates, supra*, the affidavit did provide the magistrate with a substantial basis for determining the existence of probable cause.

This Court has recently noted in *United States v. Leon, supra*, that there is no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magi-

strate." *Id.* at 3418. Therefore, "imposition of the exclusionary sanction is not necessarily meaningful to inform judicial officers of their errors, and we cannot conclude admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* Thus, this Court specifically concluded that suppression of evidence obtained pursuant to a warrant "should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 3419.

In the instant case, as the officers presented information in the affidavits which they believed to be true at the time it was given and as any inaccuracies have been shown to be immaterial and as the magistrate had sufficient probable cause presented to him to issue the warrants, any exclusion of evidence in the instant case would simply not further the purposes of the exclusionary rule. Thus, no basis has been shown for the granting of certiorari in regard to this allegation.

VII. THE SEARCH OF PAMELA JEAN LONG WAS JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

Petitioner Long has finally challenged the search of her person and her purse at the time of her arrest. Respondent submits that this was a valid search incident to arrest.

The information known to the law enforcement officers at the time of the arrest was that all persons arrested appeared to be involved in a conspiracy relating to drug trafficking. Agents had monitored phone calls relating to drugs. On March 24, 1983, Lawrence Duncan received a phone call from a person named Raoul stating that he had various items for Duncan which appeared to be codes for drugs. Raoul's vehicle was supposed to arrive in Savannah on Friday morning and he would be at the usual place on Saturday morning. On Friday the Duncans drove to Savannah where they met another vehicle from Dade County on early Saturday morning, this being the vehicle belonging to the Van Nices. On Saturday and Sunday both vehicles engaged in furtive maneuvers. Numerous telephone calls were made and packages were observed moving between the vehicles and a residence on Montgomery Crossroads. The vehicles arrived at the K-Mart parking lot and the occupants appeared to look for surveillance. The arrest was made with the cars together in the lot.

Under Georgia law, conspiracy may be shown by inference and deduction from conduct which shows common design on the part of the persons to act together for the accomplishment of the unlawful purpose. *See Wireman v. State*, 163 Ga. App. 439, 440, 295 S.E.2d 530 (1982). Under the circumstances of the instant case, the officers were justified in concluding that a conspiracy was ongoing and that Petitioner Long was a participant in this conspiracy. Thus, there was probable cause to arrest Petitioner Long and due to the exigent circumstances, there was probable cause to search her person. Therefore, Petitioner Long has shown no Fourth Amendment violation by this allegation.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully prays that the petitions for writs of certiorari filed on behalf of the various Petitioners be denied.

Respectfully submitted,

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—o—

On Petition For Writ of Certiorari to the Court of Appeals of the State of Georgia

—o—

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

—o—

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TABLE OF CONTENTS

	Page
CONCLUSION	4
APPENDIX "M"	1a
APPENDIX "N"	2a

TABLE OF AUTHORITIES

Page

CASES:

Cox v. State, 152 Ga. App. 453 (1979) 4

Dewey v. Des Moines, 173 U.S. 193, 43 L. Ed. 665, 19 S. Ct. 379 (1899) 3

Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) 3

Stanley v. Illinois, 405 U.S. 645, 658, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) 3

Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) 4

Terminiello v. Chicago, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949) 3

Vachon v. New Hampshire, 414 U.S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664 (1974) 3

Wood v. Georgia, 450 U.S. 261, 67 L. Ed. 2d 220, 100 S. Ct. 1097 (1981) 3

STATUTES:

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* 4

18 U.S.C. § 2518 ..... 2, 3, 4, 5

O.C.G.A. § 16-11-67 2

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—o—

REPLY OF PETITIONERS TO BRIEF OF RESPONDENT

Pursuant to rule of the Supreme Court of the United States 22.5, the within is a reply brief on behalf of Petitioners' Duncan. Same is in reply to the first question for review as posed in Respondent's Brief in Opposition to

the Petition for Writ of Certiorari. In accordance with Court Rule 22.5 the within brief is limited to issues first raised in Respondent's Brief in Opposition.

In that Brief, Respondent acknowledges that Petitioners addressed the issue of standing to contest the illegal seizure of the telephone toll records under the Fourth and Fourteenth Amendments of the United States Constitution and under Georgia law. Respondent argues, however, that "Petitioners failed to timely raise an assertion that they had standing under 18 U.S.C. § 2518 to challenge the alleged illegality of the subpoenas."

In this regard, Respondent states that, "[i]n the original briefs filed in the Court of Appeals of Georgia, the Petitioners raised this [illegal subpoena] allegation under the Fourth Amendment to the United States Constitution and asserted this allegation under the Georgia wiretap statute. See, O.C.G.A. § 16-11-67. Petitioner did not mention the federal wiretap statute in relation to this allegation . . . . Petitioners did not raise this statutory concept until after the Court of Appeals of Georgia had rendered its original opinion." Respondent's Brief, p. 3.

In sum, Respondent concedes that the issue of standing was raised before the Court of Appeals, but complains that 18 U.S.C. § 2518 was not cited in support of that issue until rehearing in that court.

Pretermitting whether failure to argue an authority in support of an issue in the court below would preclude a party from citing that authority in support of that same

issue on appeal,[1] Petitioners did in fact cite 18 U.S.C. § 2518 in their original brief before the Court of Appeals in support of their Enumeration of Error Number One. Enumeration of Error Number One dealt exclusively with the illegal subpoena and standing issues, and the ensuing illegality of the electronic surveillance. (Supplemental Appendix "M").

In Part III, Section (i) of Petitioners' original Brief in the Court of Appeals of Georgia, (Supplemental Appendix "N"), it was recited as follows: "(i) . . . [Enumerations of Error 1-20]. Both federal and state law provide statutes regulating and controlling the use of electronic surveillance. The federal statute is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. . . . In Georgia, it has been held that the provisions of both the federal and state statutes must be met in order for electronic surveillance to be legal and in order for it to be admissible at trial. (cits.). 'Whether the

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[1]Decisions of this court indicate that if the question raised is "only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment . . . .," then this Court would "have no hesitation in holding the assignment sufficient to permit the question to now be raised and argued. Parties are not confined here to the same arguments which were advanced in the Courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-198, 43 L. Ed. 665, 19 S. Ct. 379 (1899). See also in this regard, *Terminiello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1949); *Vachon v. New Hampshire*, 414 U.S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664 (1974); *Stanley v. Illinois*, 405 U.S. 645, 658, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); *Wood v. Georgia*, 450 U.S. 261, 67 L. Ed. 2d 220, 100 S. Ct. 1097 (1981).

proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III,' " citing. *Cox v. State*, 152 Ga. App. 453 (1979).

Thus, Respondent is incorrect in the assertion that 18 U.S.C. § 2518 was not cited in support of Enumeration of Error Number One in the Court of Appeals of Georgia, which dealt exclusively with the illegal subpoena and standing issues, and the ensuing illegality of the electronic surveillance.

Although further argument as to Enumeration of Error Number One followed in Section (ii) of the Brief without additional citation to 18 U.S.C. § 2518, this does not take away from the fact that 18 U.S.C. § 2518 had previously been cited as a basis of error in Section (i) of the Brief as to that same enumeration of error. As such, this federal authority was cited to the Court of Appeals of Georgia as a pertinent basis for ruling that the electronic surveillance was illegal. " 'No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.' " *Street v. New York*, 394 U.S. 576, 584, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969).

CONCLUSION

Respondent argues that Petitioners failed to present an assertion regarding standing to the Court of Appeals of Georgia until rehearing in that court. Upon close scrutiny, however, the Respondent concedes that the issue of standing was squarely before the court but argues that Petitioners failed to cite 18 U.S.C. § 2518 in support of the standing issue. Again, as shown above, 18 U.S.C. § 2518 was cited in support of Enumeration of Error Number One in the original brief to the Court of Appeals, Enumeration of Error Number One dealing solely with the illegal subpoena and standing issues. This citation and argument in the brief before the Court of Appeals of Georgia was apparently overlooked by Respondent in preparing its response to the Petition for Writ of Certiorari. As such Respondent's first question presented, (page i of Respondent's Brief), is without merit.

Respectfully submitted,

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APPENDIX "M"

IN THE COURT OF APPEALS OF GEORGIA

LAWRENCE DUNCAN and
MARGARET DUNCAN, et al.,

Appellants,

vs. APPEAL NO. 72190

STATE OF GEORGIA,

Appellee.

ENUMERATION OF ERRORS

(1) The trial court erred in denying Appellants' motion to suppress all evidence seized as a result of the wiretap in that the same was obtained through use of illegal, sham subpoenas issued in nonexistent cases.

APPENDIX "N"

PART III

ARGUMENT AND CITATION OF AUTHORITIES

(i) *General Provisions of Law* (Enumerations of Error, 1-20).

Both federal and state law provide statutes regulating and controlling the use of electronic surveillance. The federal statute is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520. The applicable Georgia code sections are O.C.G.A. §§ 16-11-60, 16-11-62, 16-11-64, 16-11-67, and 16-11-69. In Georgia it has been held that the provisions of both the federal and state statutes must be met in order for electronic surveillance to be legal and in order for it to be admissible at trial. See, e.g., *Orkin v. State*, 236 Ga. 176, 179 (1976); *Cox v. State*, 152 Ga. App. 453 (1979). " '[W]hether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III. If a state should set forth procedures *more* exacting than those of the federal statute, however, the validity of the interceptions and the orders of the authorization by which they were made would have to comply with that test as well.' " [Emphasis by the court]. *Cox* at p. 455, quoting *U.S. v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976).